Supreme Court, U.S.

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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

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FERDINAND HAMMER,
Petitioner,
v.

IMMIGRATION and NATURALIZATION SERVICE,
Respondent.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

William E. Bufalino, II
Counsel of Record
Bufalino and Palazzolo, P.C.
Attorneys for Petitioner
33830 Harper Avenue
Clinton Township, MI 48035
(810) 415-1200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

133 pp

QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR IN AFFIRMING THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL?

2. DID THE COURT OF APPEALS ERR IN AFFIRMING THAT PETITIONER IS DEPORTABLE UNDER THE HOLTZMAN AMENDMENT?

3. DID THE COURT OF APPEALS ERR IN DISREGARDING THE "SPECIAL AND AFFIRMATIVE DEFENSES" OF PETITIONER?

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OPINIONS BELOW

On 24 April 1997, the Immigration Court ordered Petitioner Ferdinand Hammer (a/k/a Fred Hammer, Ferko Hammer) ("Hammer") deported to Austria pursuant to § 241(a)(4)(D) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1251(a)(4)(D) (now 8 U.S.C. § 1227(a)(4)(D), on the ground that he assisted in the persecution of persons because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany. Hammer appealed the decision of the Immigration Court to the Board of Immigration Appeals (BIA). On 13 October 1998 the BIA affirmed the deportation order and dismissed Hammer's appeal.

On 8 November 1999, the Sixth Circuit Court of Appeals affirmed the decision of the BIA in Case No. 98-4339.

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JURISDICTION

Petitioner seeks review of the Sixth Circuit Court of Appeals affirming the deportation order of the Board of Immigration Appeals against Petitioner Ferdinand Hammer (No. 98-4339).

The jurisdiction to review the Judgment of the Sixth Circuit Court of Appeals is pursuant to 8 U.S.C. § 1105A and 8 U.S.C. § 1252.

◆

STATUTES INVOLVED IN THIS CASE

The Holtzman Amendment provides as follows:

> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with –
>
> (I) the Nazi government of Germany,
>
> (II) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (III) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (IV) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

8 U.S.C. § 1182(a)(3)(E).

◆

STATEMENT OF THE CASE

The Petitioner is a 78 year old male who was born in Lacarak, Yugoslavia on 30 July 1921 and is a stateless person. He entered the United States as a lawful permanent resident on 6 August 1955. On 23 September 1963, he became a naturalized citizen of the United States. Subsequently, the government brought a denaturalization action against the Respondent in the United States District Court for the Eastern District of Michigan. *United*

States v *Hammer,* 94 CV-74985-DT (E.D. Mich. 21 June 1996). On 21 June 1996, the United States District Court found in favor of the government and entered a Judgment of Denaturalization revoking the Petitioner's United States citizenship and canceling his Certificate of Nationalization. (Judgment of Denaturalization, 21 June 1996).

On 31 October 1996, the government commenced deportation proceedings against the Petitioner by issuing an Order to Show Cause and Notice of Hearing, charging him with deportability on three bases: (1) pursuant to § 241(a)(4)(D) of the Immigration and Nationality Act of 1953, 8 U.S.C. § 1251(a)(4)(D), as an alien, who, at the Auschwitz Concentration Camp, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in the association with, the Nazi government of Germany; (2) pursuant to § 241(a)(4)(D) of the Act, as an alien, who, on the prisoner transport from the Auschwitz Concentration Camp to the Sachsenhausen Concentration Camp ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction, or in the association with, the Nazi government of Germany; and (3) pursuant to § 241(a)(4)(D) of the Act, as an alien, who the Sachsenhausen Concentration Camp, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in the association with, the Nazi government of Germany.

On 3 February 1997, the Chief Administrative Law Judge conducted a Master Calendar Hearing in this matter. At the hearing, the Petitioner, through counsel, denied the factual allegations and charges contained in the Order to Show Cause.

On 25 February 1997, the parties filed their Joint Prehearing Statement. The government stated that the sole legal issue in the case was "whether respondent's service as an armed SS Death's Head guard at Auschwitz and Sachsenhausen, or while guarding prisoners when they were transported from Auschwitz to Sachsenhausen, and later from Sachsenhausen to Mauthausen, constituted participation or assistance in persecution, as prescribed by § 241(a)(4)(D) of the Holtzman Amendment." The Petitioner contends that the issue before the court is "whether Petitioner's conduct would constitute persecution of any person because of race, religion, national origin, or political belief". Furthermore, the Petitioner incorporated by reference the Special and Affirmative Defenses set forth in his answer to the allegations contained in the Order to Show Cause. The government objected to the Petitioner's Special and Affirmative Defenses. In a recorded telephonic pretrial hearing, the Chief Administrative Law Judge stated that he would make a finding regarding the Special and Affirmative Defenses, prior to the Merits Hearing. On 17 March 1997, the Chief Administrative Law Judge conducted a Merits Hearing, without making a finding on the Special and Affirmative Defenses, and took the matter under advisement as to the government's objections and arguments to the Respondent's Special and Affirmative Defenses until the record is closed and the court issues its decision. This is contrary to the recorded telephonic pretrial which indicated that the Chief Administrative Law Judge would make his decision on the Special and Affirmative Defenses prior to the hearing on the merits.

On 24 April 1997 the Chief Administrative Law Judge found that the Petitioner is subject to deportation pursuant to the charges contained in the Order to Show Cause by evidence which is clear, unequivocal, and convincing. Furthermore, the Chief Administrative Law Judge found that the Petitioner is deportable pursuant to § 241(a)(4)(D) of the Act. That he is precluded as a matter of law from obtaining the reliefs sought, and ordered him deported from the United States to Austria.

On 13 October 1998 the Board of Immigration Appeals dismissed the appeal, without oral argument, upholding the order of the Chief Administrative Law Judge.

On 8 November 1999 the Sixth Circuit Court of Appeals affirmed the decision of the Board of Immigration Appeal in Case No. 98-4339.

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REASONS FOR GRANTING THE WRIT

1. Did the Court of Appeals err in affirming the application of the doctrine of collateral estoppel?

There is a clear distinction between the legal problems involved in denaturalization litigation and those found in deportation litigation. In denaturalization proceedings involving individuals from the Nazi-Era, a central issue has been the materiality of the defendant's misrepresentation or concealment of his Nazi past. Because the Holtzman Amendment to the Immigration and Nationality Act provides for the deportation for those who assisted Nazi Germany in the persecution of persons because of race, religion, national origin or political opinion, the question of whether the alien lied, misrepresenting or concealing the material fact is not the central issue.

Collateral Estoppel is appropriate only when the identical issue has been actually litigated in a prior case. *In Title* v *INS*, 322 F.2d 21 (9th Cir. 1963), the 9th Circuit reviewed an immigration order of deportation because of membership in the communist party. The Immigration Judge had denied *Title's* request to present evidence at the deportation hearing. All evidence relating to the alien's membership in the communist party was introduced by collateral estoppel. The 9th Circuit held that application of the doctrine against *Title* would work an injustice because the petitioner had not testified at the denaturalization hearing or wished to introduce evidence at the deportation hearing because of change in the law regarding his communist party affiliation. To apply the doctrine of collateral estoppel would work an injustice.

It is contrary to the due process clause to permit the Respondent to rely on the use of collateral estoppel in this situation where the "factual basis" is different in the deportation proceedings as compared to the denaturalization proceedings. In the underlying denaturalization proceedings, the same issues were not litigated. Many items were stricken by the trial court, and there was not a complete adjudication of all of the facts and circumstances which are necessary to meet the requirements in the deportation proceedings. Petitioner's involvement and his alleged cooperation with the Nazi government was not an issue in the denaturalization proceedings. Petitioner's involvement in persecution and his acting voluntarily was not an issue in the denaturalization proceedings. Furthermore, Petitioner was not given a fair and full opportunity to litigate the issues in the denaturalization proceeding.

2. Did the Court of Appeals err in affirming that Petitioner is deportable under the Holtzman Amendment?

The Holtzman Amendment makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war, therefore, the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation. "Assistance" can only take us so far. It is equivalent to "aiding and abetting". Both to "participate in persecution" and to "assist in persecution" should require acts in conduct coupled with the pertinent culpable state of mind.

In *Laipenieks* v *INS*, 750 F.2d 1427 (9th Cir. 1985) the Court requires "personal active assistance or participation." One of the more complete discussions of the issue will be found in *Petkiewvtsch* v *INS*, 945 F.2d 871, 876-881 (6th Cir. 1991) where some very different "line drawing" by the Seventh Circuit and the other Circuits is described. The "line drawing" in cases under the Holtzman Amendment have been particularly difficult and has produced conflicting results. In *Schellong* v *INS*, 805 F.2d 655 (7th

Cir. 1986), *cert. denied,* 481 U.S. 1004, 107 S.Ct 1624, 95 L.Ed.2d 199 (1987), the Court of Appeals applied the Holtzman Amendment to affirm the deportation of a person who voluntarily joined a special commando unit of the Nazi SS and served as an armed guard at two concentration camps. There was no evidence, however, that *Schellong* personally engaged in physical abuse of prisoners while serving as a guard. The Court noted that it had previously held in *United States* v *Kairys,* 782 F.2d 1374 (7th Cir.), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2258, 90 L.Ed.2d 703 (1986), that service as a guard at a concentration camp equaled persecution under the Displaced Persons Act without proof of personal involvement in atrocities. Another Court reached a different conclusion in *Laipenieks* v *INS,* 750 F.2d 1427 (9th Cir. 1985), a deportation proceeding under the Holtzman Amendment against a native of Latvia. The Court of Appeals found that the INS failed to establish by clear and convincing evidence that Laipenieks' individual conduct had been motivated by the political opinion of the prisoners. Relying on the legislative history of the Holtzman Amendment, the Court held that deportability under section 1251(A)(19) "may only be sustained when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution of individuals".

When the Holtzman Amendment was adopted, it had become clear that some war criminals, actual perpetrators of the Holocaust and other war crimes, had entered this country. The Holtzman Amendment provided the basis for their deportation. The Holtzman Amendment's legislative history contains a clear and repetitive message that the amendment was intended to deny "sanctuary in the United States to Nazi war criminals", 124 Cong. Rec. 31,647 (1978). The "Bill applies to any person who committed war crimes under the Nazi's . . . " *id.* at 31649. The specific discussion on the House floor in which Representative Holtzman explained the purpose and scope of the Bill demonstrates that the focus of the Bill's intent centers on Nazi war criminals. Indeed reference to "Nazi war criminals" or "war criminals" is made no less than 19 times during the short discussion in which the purpose or reach of the Bill is explained. See 134 Cong. Rec. 31,646-50 (1978). At one point Representative Holtzman explained the Bill as follows: "The Bill as reported here contains an amendment that limits the language of the Bill solely to those persons who engaged in war crimes . . . " 134 Cong. Rec. 31,647 (1978). Again she stated, "The Bill is intended to cover active participation and not mere acquiescence by the population as a whole." *Id.* at 31,649. Representative Holtzman was joined in explaining the Bill by another subcommittee member, Representative Eilberg, who stated the Bill's purpose: The purpose of this Bill, which is cosponsored by all of the members of the subcommittee on Immigration Citizenship and International Law, is to prevent the entry into, as well as facilitate the deportation from the United States of aliens who have engaged in persecution based on race, religion, national origin or political opinion under the Nazis. Mr. Eilberg and Ms. Holtzman each went on to make several additional references regarding the Bill's applications to those who engaged in war atrocities. *Id.* at 31,647-48. Representative Eilberg also stated: That dreadful period in the history of mankind should forever serve as a tragic reminder to all civilized people of the terrible extremes to which an entire nation can be led by a small but highly organized group of demented and ruthless leaders. This Bill addresses itself to the members of that group to the perpetrators of the "Holocaust." *Id.* at 31,647.

The Holtzman Amendment's purpose of reaching war criminals is further clarified by statements in the legislative history indicating the degree of participation in persecution necessary to come within the Holtzman Amendment. The statement of the Holtzman Amendment's purpose reads: Purpose of the Bill: the purpose of the Bill is to exclude from admission to the United States aliens who have persecuted any person on the basis of race, religion, national origin, or political opinion and facilitate the deportation of such aliens who have been admitted into the United States. H.R. Rep. No. 95-1452, 95th Cong. 2d Sess. at 1, reprinted in 1978 U.S. Code Cong. & Admin. News 4700. This language appears to require active participation in persecution going beyond "assistance." In discussing the Holtzman Amendment's application, the House Report goes on to state that "it is important to stress that the conduct envisioned must be of a deliberate and severe nature and such that is condemned by civilized governments." *Id.* at 7, 1978 U.S. Code Cong. & Admin. News 4700. Deporting this petitioner would not further the goal of the Holtzman Amendment and would carry out no discernable policy of the United States.

3. Did the Court of Appeals err in disregarding the "special and affirmative defenses" of Petitioner?

The Holocaust was a heinous crime against humanity, but in prosecuting its alleged perpetrators we must not forget about civil liberties – the Holocaust became possible when the Nazi region abrogated civil liberties in Germany. The more heinous the crime, the greater is the danger that civil liberties will be trampled in the rush for the public's natural desire for vengeance. Civil liberties exist so that justice will prevail no matter how shrill the demand for retribution.

It was the responsibility of the Immigration and Naturalization Services (INS) to investigate allegations about aliens in this country who might be subject to deportation. Prior to 1973, the INS filed only nine deportation cases against alleged Nazi collaborators, only one of which was successfully prosecuted to actual deportation. The INS until the 1970's, had no centralized effort devoted to identifying Nazi war criminals. According to a 1978 General Accounting Office (GAO) report entitled *Wide Spread Conspiracy to Obstruct Probes of Alleged Nazi War Criminals Not Supported By Available Evidence-Controversy May Continue,* INS investigations of most cases before 1973 "were deficient or perfunctory" and in some cases "no investigation was conducted." The GAO noted that the INS did not know how many allegations of Nazi war criminals it had received. With the public eye now focused on it, the INS increased its identification efforts. By April, 1978 it had a list of 252 allegations and those cases on which actions had been taken before 1973 were re-evaluated and investigations on some were reopened.

In addition the government instituted legal proceedings against thirteen individuals.

In the United States the process of "Nazi hunting" was initiated on a comprehensive basis with the creation of the Office of Special Investigations within the criminal division of the Department of Justice. OSI was formed on September 4, 1979 to enforce Public Law 95-549, passed by Congress the previous October 30th. The mission of OSI was and is to identify and bring legal proceedings to denaturalize and deport individuals who participated in Nazi sponsored acts of persecution. By September of 1999, OSI had succeeded in denaturalizing sixty-three participants in Nazi acts of persecution and in removing fifty-two such individuals from this country.

Public Law 105-246, *The Nazi War Crimes Disclosure Act*, was signed by President Clinton on October 8, 1998. In accordance with the Act, by Executive Order 13110, the President established the Nazi War Criminals Records Inter-Agency Working Group to locate, inventory, recommend for declassification, and make available to the public all classified Nazi war criminal records.

Many changes have taken place in the last fifty-five years, but no one can undo the wrong that was done by the Nazis. On the other hand, to remove this 78 year old man from his country of choice and his family would just continue the atrocities. He should be afforded the same civil and constitutional rights that every other human being is entitled to. Due process of law would and should grant to him these "special and affirmative defenses".

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CONCLUSION

There was not an impartial trial. There was no ability to present full answer and defense after all these years. The Government's proofs should include a showing of personal active assistance or participation in persecutorial acts before deportability may be established. This was not done.

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RELIEF REQUESTED

Petitioner respectfully requests this petition be granted and a writ of certiorari issue to review this case and remand to the INS for further hearings.

Respectfully submitted,

William E. Bufalino, II
Bufalino and Palazzolo, P.C.
33830 Harper Avenue
Clinton Township, Michigan 48035
Telephone No. (810) 415-1200

Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ferdinand Hammer,

Petitioner, No. 98-4339

v.

Immigration and Naturalization Service,

Respondent.

On Petition for Review of an Order
from the Board of Immigration Appeals.

No. A08 865 516

Argued: September 15, 1999

Decided and Filed: Novemer 8, 1999

Before: BATCHELDER and GILMAN, Circuit Judges;
HOOD,* District Judge.

COUNSEL

ARGUED: William E. Bufalino II, BUFALINO & PALAZZOLO, Clinton Township, Michigan, for Petitioner, Jeffrey L. Menkin, U.S. DEPARTMENT OF JUSTICE, SPECIAL INVESTIGATIONS, CRIMINAL DIVISION, Washington, D.C., for Respondent. **ON BRIEF:** William E. Bufalina II, BUFALINO & PALAZZOLO, Clinton Township, Michigan, for Petitioner, Jeffrey L. Menkin, Lisa Newell, U.S. DEPARTMENT OF JUSTICE, SPECIAL INVESTIGATIONS, CRIMINAL DIVISION, Washington, D.C., for Respondent.

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* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. Ferdinand Hammer, a 78-year-old resident of Michigan, complains that he is about to be deported to a country that he has not seen in more than half a century on the basis of conduct that he claims is wrongly attributed to him. In response, the government charges that in his youth Hammer was an active participant in Hitler's "final solution." There is no question that Hammer served as a member of the SS in the army of Nazi Germany during World War II. After the war, he entered the United States and became an American citizen. In 1994, the government commenced denaturalization proceedings against him in the United States District Court for the Eastern District of Michigan, alleging that he had concealed from the immigration authorities the fact that he had served as an armed SS guard at the Auschwitz and Sachsenhausen concentration camps and on prisoner rail transports between concentration camps.

The district court ordered that Hammer be denaturalized, an order from which Hammer did not appeal. Following the denaturalization decision, the government began this deportation action against Hammer in an administrative proceeding brought before the immigration court. The immigration judge concluded that Hammer should be deported, and the Board of Immigration Appeals (BIA) dismissed Hammer's appeal. For the reasons set forth below, we **DENY** Hammer's petition for review.

I. BACKGROUND

It is undisputed that Hammer is an ethnic German, born in Lacarak, Croatia, who served as a member of the SS in the army of Nazi Germany. He came to the United States and was naturalized as a citizen in 1963. Beyond these bare facts, however, the parties do not agree. The government claims that Hammer was an armed SS prison guard at the notorious Auschwitz concentration camp, where over one million Jews, Gypsies, Christian clergy, and other opponents of the Nazi regime lost their lives. It further claims that he served as an armed guard at the Sachsenhausen concentration camp, and on prisoner transport trains between the Auschwitz, Sachsenhausen, and Mauthausen concentration camps.

In 1994, the government commenced a denaturalization proceeding against Hammer. The gravamen of the government's complaint was that Hammer had illegally obtained United States citizenship by concealing the fact that he had served in the notorious "Death's Head Battalion" (Totenkopfverbaende) of the Nazi Waffen-SS. Hammer, in contrast, claimed that he had served in an SS combat unit known as the Wiking Division which saw action on the Russian front. In its June 1996 order, the district court specifically found Hammer's testimony incredible. The district court concluded that Hammer had procured his United States citizenship by willful, material misrepresentation and concealment of his service as an armed concentration camp guard and prisoner escort. It ordered his certificate of naturalization revoked. Hammer did not appeal.

In October of 1996, the government began deportation proceedings against Hammer. It charged that Hammer was deportable pursuant to the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E). The Holtzman Amendment renders ineligible for entry into the United States any alien who assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany. A corresponding statutory section, 8 U.S.C. § 1227(a)(4)(D), authorizes the government to deport such aliens. The immigration judge held a hearing on March 17, 1997, during which the government introduced over 2,000 pages of exhibits, including the bulk of the evidence that it had presented at the denaturalization proceeding. Hammer presented two witnesses who had briefly known him in Europe, gave his own testimony, and introduced an unauthenticated document stating that ethnic Germans in Croatia were automatically drafted into the Waffen-SS.

In an opinion dated April 24, 1997, the immigration judge held that the doctrine of collateral estoppel barred Hammer from relitigating issues relating to his date of birth, wartime service, and the conditions at the concentration camps where he served. The immigration judge also conducted an independent review of the evidence submitted at the denaturalization proceeding, concluding that the government had proven by unequivocal, clear, and convincing evidence that Hammer had assisted in persecutions on the basis of race, religion, national origin, or political opinion. Accordingly, the immigration judge held that Hammer was subject to deportation pursuant to the Holtzman Amendment. He found Hammer's testimony to be inconsistent and incredible, just as the district court had. (Among other things, Hammer could not recall the name of the SS Wiking Division officer under whom he had supposedly served or the name of a single battle in which he had supposedly fought.)

Hammer was ordered deported to Croatia, although the Croatian embassy subsequently advised the government that Croatia would not accept him. The deportation order was thereafter amended to state that Austria was the country to which Hammer was to be deported. He timely appealed to the BIA, which dismissed Hammer's appeal. This petition for review followed.

II. ANALYSIS

A. Standard of review

The BIA's factual determinations are subject to the substantial evidence standard of review. "All the substantial evidence standard requires is that the BIA's conclusion, based on the evidence presented, be substantially reasonable." *See Klawitter v. INS*, 970 F.2d 149, 151 (6th Cir.1992) (internal quotation marks and citation omitted). "Substantial evidence is thus a deferential standard which plainly does not entitle a reviewing court to reverse . . . simply because it is convinced that it would have decided the case differently . . . [I]n order to reverse the BIA's factual determinations, the reviewing court must find that the evidence not only supports a contrary conclusion, but indeed compels it." *Adhiyappa v. INS*, 58 F.3d 261, 265 (6th Cir.1995) (internal quotation marks and citation omitted). Legal questions are reviewed *de novo. See id.*

B. Collateral estoppel

Hammer claims that the BIA incorrectly applied the doctrine of collateral estoppel to the district court's factual findings in the denaturalization proceeding. Although he does not explicitly say so, it appears that Hammer seeks another hearing so that he may contest the facts in question.

The availability of collateral estoppel is a mixed question of law and fact which this court reviews *de novo. See United States v. Sandoz Pharm. Corp.*, 894 F.2d 825, 826 (6th Cir.1990). Under the doctrine of collateral estoppel, which is also referred to as issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States,* 440 U.S. 147, 153 (1979). The doctrine reflects the longstanding policy that one full opportunity to litigate an issue is sufficient. *See Hickman v. Commissioner,* 183 F.3d 535, 537 (6th Cir.1999).

Although the requirements for collateral estoppel are enumerated differently in different opinions, this court has recently stated that the doctrine applies only when (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue. *See United States v. Real Property Known and Numbered as 415 E. Mitchell Ave.*, 149 F.3d 472, 476 (6th Cir.1998); *Bills v. Aseltine*, 52 F.3d 596, 604 (6th Cir.1995).

As a preliminary matter, we must determine exactly what facts were deemed established by operation of the collateral estoppel doctrine. The district court made twelve findings of fact in the denaturalization proceeding. Although Hammer and the government do not agree on which of those facts were deemed established by collateral estoppel, the immigration judge's order states that only four facts were so established for the purposes of the deportation proceeding. Those facts were as follows:

> 1) [Hammer] was born on July 30, 1921;
>
> 2) [Hammer] had the rank of "Sturmmann" [roughly equivalent to a lance corporal] and served during World War II, as an armed Waffen-SS Death's Head Battalion guard at the Auschwitz and Sachsenhausen concentration camps established and operated by the Nazi government of Germany;
>
> 3) [Hammer] served as an armed Waffen-SS Death's Head Battalion (SS-Totenkopfverbaende) guard for prisoner transports between Auschwitz and Sachsenhausen concentration camps, and prisoner transport between Sachsenhausen and Mauthausen concentration camps;
>
> 4) During [Hammer's] service as an armed Waffen-SS Death's Head Battalion guard at the

> Auschwitz, Sachsenhausen, and Mauthausen concentration camps, "horrible mistreatment was meted out to inmates of those camps."

Notwithstanding the parties' arguments to the contrary, the immigration judge held that those four facts were the only ones established by collateral estoppel. We agree.

1. *Identical issues*

There is no question that the above issues are identical to those that were in dispute at the denaturalization proceeding. Hammer argues, however, that the government was required to prove certain elements in the deportation proceeding that it was not required to prove in the denaturalization proceeding. He therefore reasons that the "issues litigated" were not identical and collateral estoppel does not apply.

We find this argument to be without merit. As noted above, the only findings that the doctrine of collateral estoppel precluded him from contesting were the four findings outlined above (i.e., his date of birth, his service as a concentration camp guard, his service as a prisoner transport guard, and the fact that inmates at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps were horribly mistreated). Although Hammer points out the absence of eyewitness testimony that he had personally engaged in persecution, the immigration judge did not assume that the district court had found that Hammer had personally participated in wartime atrocities (at least beyond the atrocities in which an armed concentration camp guard necessarily would have participated or assisted simply by virtue of being an armed concentration camp guard). The district court was not required to make, and in fact did not make, any such finding. In order to denaturalize Hammer, the district court had only to find that he obtained his United States citizenship through concealment of a material fact or by a willful, material misrepresentation. Hammer's argument is more properly understood as one regarding the sufficiency of the evidence presented, and is therefore discussed in Part C below.

2. *Actually litigated and decided*

The issues of when Hammer was born, where and when he served, and what happened at the concentration camps in question were extensively litigated in the denaturalization proceeding in the district court. There, the government presented documentary evidence showing that Hammer was an armed SS guard at Auschwitz and Sachsenhausen, and served as a guard on prisoner rail transports between Nazi concentration camps. Included in this evidence were Nazi-regime documents identifying Hammer by name, rank, and date of birth. The government also presented the testimony of an expert witness and two Auschwitz survivors to prove the nature of the concentration camp.

In the district court's opinion and order, it specifically found that Hammer was born on July 30, 1921, that he served in the Death's Head Battalion of the Waffen-SS at Auschwitz and Sachsenhausen concentration camps, and that while Hammer was a guard there, "horrible mistreatment was meted out to inmates of these camps."

The four factual findings were thus actually litigated and decided in the denaturalization proceeding.

3. *Necessary and essential to a judgment on the merits*

The key legal question in the denaturalization proceeding was whether Hammer had procured his citizenship through the concealment of a material fact or by willful, material misrepresentation. *See* 8 U.S.C. S 1451. In Hammer's case, the material facts were where he served during the war and when he was there. The first three findings established by collateral estoppel directly relate to these material facts.

Hammer testified that he was a soldier on the Russian front, but the government's evidence established that he was actually an SS concentration camp and prisoner transport guard. The location and duration of Hammer's Nazi service were clearly "necessary and essential" to the denaturalization proceeding. Hammer's birth date was also necessary and essential. As part of demonstrating that Hammer had materially misrepresented the nature of his involvement with the Nazis, the government also had to prove his birth date, by which he was identified in Nazi documents along with his name and rank. The first three findings were thus necessary and essential to a judgment on the merits.

As to the final finding – that the conditions of Nazi concentration camps were horrible – the government contends that this fact was "essential to the court's finding that Hammer's misrepresentations of his guard service were material to the decision to grant Hammer citizenship." Hammer has not challenged this finding, presumably because his defense is based on his contention that he served in an SS combat unit, not as a concentration camp guard.

4. *Hammer was a party to the prior litigation*

Hammer necessarily concedes that he was a party to the prior litigation.

5. *Hammer had a full and fair opportunity to litigate the issues*

Hammer states in his brief that he was denied a full and fair opportunity to litigate the issues, but does not identify any specific deficiency in the proceedings. To the contrary, the record reflects that the district court provided Hammer a hearing that comported with all of the standards of due process.

All five collateral estoppel factors having been satisfied, we conclude that the BIA did not err in affirming the immigration judge's application of the doctrine of collateral estoppel. We also note that even without the benefit of collateral estoppel, the evidence that the government presented at Hammer's deportation hearing, and which the immigration judge independently reviewed, was more than sufficient for the BIA to have reached a substantially reasonable decision to deport Hammer. The government introduced into evidence properly authenticated wartime concentration camp guard rosters that identified Hammer as an SS Death's Head Battalion guard at the Auschwitz and Sachsenhausen concentration camps, and as a guard on prisoner transports between the Auschwitz and Sachsenhausen camps and between the Sachsenhausen and Malthausen camps. In addition, the government introduced a properly authenticated document prepared in 1945 by the United States Army, which was based on a review of seized SS records, and which identified Hammer by name, rank, date, and place of birth as a member of the 1st Company of the SS Death's Head Battalion at the Auschwitz concentration camp.

C. Direct evidence of persecution

Hammer claims that the government failed to prove that he is deportable under the Holtzman Amendment. His primary point is that the government did not prove that he personally engaged in "persecution" as defined by the Amendment.

The Holtzman Amendment provides as follows:

> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with –
>
> > (I) the Nazi government of Germany,
> >
> > (II) any government in any area occupied by the military forces of the Nazi government of Germany,
> >
> > (III) any government established with the assistance or cooperation of the Nazi government of Germany, or
> >
> > (IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated

> in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

8 U.S.C. § 1182(a)(3)(E).

Hammer argues that the government failed to meet its burden of proving that he "ordered, incited, assisted, or otherwise participated in . . . persecution" because it did not present "specific evidence of persecution by the Petitioner against the prisoners or that, as a guard, he engaged in acts of brutality against them." The government, however, need not present evidence of personal involvement in specific atrocities under the Holtzman Amendment. As the Seventh Circuit has observed:

> Because the statute authorizes deportation of anyone who "assisted" in persecution, personal involvement in atrocities need not be proven. [A]n individual who served as a guard has assisted in persecution for purposes of [the Holtzman Amendment]. . . . Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression.

Kulle v. INS, 825 F.2d 1188, 1192 (7th Cir.1987) (first set of brackets in original). *See also Kairys v. INS*, 981 F.2d 937, 942-43 (7th Cir.1992) (holding that an alien's service as an armed SS guard at a labor camp attached to the Treblinka concentration camp rendered the alien deportable under the Holtzman Amendment for having "assisted" in Nazi persecution "whether or not he committed a specific atrocity by beating a Jewish inmate to death or otherwise mistreating him beyond what is implicit in serving as a guard at such a camp . . . "). As Judge Posner explained in Kairys:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Id. at 943.

We find the reasoning in both Kulle and Kairys to be persuasive. The facts presented by the government show that Hammer served as an armed SS guard at Auschwitz and Sachsenhausen, and on prisoner rail transports. As a guard, Hammer had standing orders to shoot anyone who attempted to escape. Although Hammer correctly observes that the government produced no evidence that Hammer actually shot anyone or forced any prisoner into a gas chamber, no court has required such a showing. Over one million people were murdered based solely on their religion or ethnicity at the concentration camps where Hammer stood guard. Hammer's interpretation of the Holtzman Amendment would read the words "assisted, or otherwise participated" out of the statute. We conclude that the requirements of the Holtzman Amendment may be satisfied even in the absence of eyewitness testimony that the alien personally engaged in acts of brutality.

The cases most strongly supporting Hammer's position are *Laipenieks v. INS,* 750 F.2d 1427 (9th Cir.1985), and *United States v. Sprogis,* 763 F.2d 115 (2d Cir.1985), both of which involved aliens who served as Latvian police officers during the time that Latvia was occupied by Nazi Germany. To the extent that those cases would require the government to prove the alien's personal participation or active assistance in specific acts of brutality, *see Laipenieks,* 750 F.2d at 1431; *see also Sprogis,* 763 F.2d at 122, we decline to follow them. *Compare United States v. Kairys,* 782 F.2d 1374, 1377 n. 3 (7th Cir.1986) (concluding that service as an armed concentration camp or labor camp guard as a matter of law equals persecution of civilians within the meaning of the Displaced Persons Act); *Schellong v. INS,* 805 F.2d 655, 661 (7th Cir.1986) (rejecting *Laipenieks* and *Sprogis* as inconsistent with *Fedorenko v. United States,* 449 U.S. 490 (1981), and specifically distinguishing the two cases as involving local police officers rather than SS concentration camp guards).

We also note that in *Petkiewytsch v. INS,* 945 F.2d 871 (6th Cir.1991), a case involving a civilian forced laborer who had served under duress as a labor education camp guard, this court suggested that the Holtzman Amendment might require something more than "assistance," even though the word "assisted" appears directly in the statute. *See id.* at 880 (stating that the Holtzman Amendment "appears to require active participation in persecution going beyond 'assistance.' "). Hammer does not place great reliance on Petkiewytsch, and for good reason. The BIA found that he served willingly as an armed SS concentration camp guard. This is materially different than a prisoner serving under duress as a civilian guard at a labor education camp. Hammer, in fact, never claimed in the proceedings below that he served involuntarily as a concentration camp guard. Furthermore, the BIA found that the SS had no legal authority to conscript an ethnic German in Croatia, and even the unauthenticated document relied upon by Hammer refers only to the induction, and not conscription, of ethnic Germans.

Petkiewytsch thus appears to stand for the proposition that some forms of "assistance" to the Nazi regime (such as membership, without more, in an organization which cooperated with the Nazis) may be too attenuated to be considered "under the direction of, or in association with" the Nazi government, and thus insufficient to trigger deportation under the Holtzman Amendment. We do not believe that Petkiewytsch compels the conclusion that "assistance" to the Nazi regime can never be sufficient for deportation under the Holtzman Amendment, because such an interpretation would be squarely at odds with the text of the statute. In any event, even if Hammer did not "assist[ ]" in persecution, he certainly "otherwise participated" in it. Indeed, in Petkiewytsch, this court took pains to distinguish labor education camps and those required to serve involuntarily as civilian guards at such camps from "extermination camps such as *Auschwitz*," *Petkiewytsch*, 945 F.2d at 873-74 (emphasis added), and the SS guards who controlled them.

We thus conclude that the BIA's dismissal of Hammer's appeal was substantially reasonable.

D. Special and affirmative defenses

Finally, Hammer claims that the BIA erred in disregarding his "special and affirmative defenses." Hammer apparently refers to a series of claims made before the immigration judge that his deportation is barred by (1) the statute of limitations, (2) the doctrine of laches and estoppel, (3) waiver, and (4) the doctrine of unclean hands. In contrast, his brief on appeal discusses the constitutional prohibition against Bills of Attainder, the problems of stale evidence, and the requirements of due process under the Fifth Amendment, with references to suggestive identifications and the problems of relying on evidence from the Soviet Union. He also argues that the immigration judge's failure to rule on his "special and affirmative defenses" before the hearing deprived him of due process because he was put at "a great disadvantage."

Hammer's argument that the immigration judge erred in deferring a ruling on his defenses until after the hearing is meritless. Indeed, it appears that the decision *preserved* Hammer's due process rights by affording him the benefit of oral argument on his purported defenses. In any event, Hammer did not object during the proceedings below to the immigration judge's failure to rule on the defenses before the hearing, and has thus failed to preserve the issue for appeal.

The defenses themselves, many of which have no conceivable application to this case, indicate that they were simply culled from briefs originally prepared in another case. Hammer, for example, objects to "photographic displays" and "highly suggestive" eyewitness identifications, even though no photographs were admitted into evidence and the government did not call any eyewitnesses to identify Hammer. He also argues that the witnesses were elderly and had memory problems, even though, again, the government offered no eyewitness testimony concerning his behavior. The only eyewitness testimony in this case involved the general mistreatment that occurred at Auschwitz, an issue which cannot seriously be disputed and which Hammer in fact does not dispute.

The only "defense" that has any semblance of merit – that the Holtzman Amendment is a Bill of Attainder – was not raised below and thus has not been preserved for appeal. Even if it had been preserved, however, the argument has been rejected by every court that has considered it. *See Schellong v. INS*, 805 F.2d 655, 662 (7th Cir.1986); *Linnas v. INS*, 790 F.2d 1024, 1029-30 (2d Cir.1986); *Artukovic v. INS*, 693 F.2d 894, 897 (9th Cir.1982). In short, we find that Hammer's "special and affirmative defenses" are devoid of merit.

III. CONCLUSION

For all of the reasons set forth above, the petition for review is **DENIED**.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
FERDINAND HAMMER,
a/k/a Fred Hammer
a/k/a Ferko Hammer
Defendant.

Civil Action No. 94-CV-74985-DT
HONORABLE HORACE W. GILMORE
(Filed Jun. 21, 1996)

JUDGMENT

Before the Court is the government's complaint seeking denaturalization of the defendant, Ferdinand Hammer, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1451, as amended. This statute provides that the defendant's citizenship must be revoked and his certificate of naturalization be cancelled if his citizenship was either illegally procured or procured by concealment of material fact or by willful, material misrepresentation. The government alleged that defendant concealed from U. S. naturalization officials his World War II service as an armed SS Death's Head Battalion guard in at least the Auschwitz Concentration Camp (Auschwitz) in Poland and the Sachsenhausen Concentration Camp (Sachsenhausen) in Germany and his service as an armed SS Death's Head Battalion (SS-*Totenkopfsturmbann*) guard during the forced evacuation of concentration camp prisoners from Auschwitz to Sachsenhausen and the transport of prisoners between concentration camps.

FINDINGS OF FACT

The evidence established clearly, convincingly and unequivocally that

1. Defendant was born on July 30, 1921.

2. All three documents relied on by the government to prove defendant's service during World War II as an armed SS Death's Head Battalion guard at concentration camps established and operated by forces of the Nazi Government of Germany and on prisoner transports are authentic and reliable. These documents include the SHAEF (Supreme Headquarters Allied Expeditionary Force) card, contained in government's exhibit 20; the transfer list of prisoner escorts from Auschwitz to Sachsenhausen, government's exhibit 21; and multiple copies of the transfer list of prisoner escorts from Sachsenhausen to Mauthausen Concentration Camp (Mauthausen) in Austria, government's exhibits 24 through 27.

3. Government's exhibits 20, 21, and 24 through 27 have defendant's name and rank, "Sturmmann," on them. Government exhibit 20 (SHAEF card) and government's exhibits 24 through 27 (list from Sachsenhausen) also have his birth date, July 30, 1921. The SHAEF card also identifies defendant as a member of the Death's Head Battalion at Auschwitz.

4. The testimony of the government expert witness, Dr. Charles W. Sydnor, Jr., that these documents, including the SHAEF card, are reliable and authenticate each other in various ways, is credible.

5. Horrible mistreatment was meted out to inmates of these camps.

6. Defendant's trial testimony was not credible. He made inconsistent statements on the stand and contradicted his own prior testimony on numerous occasions. Also, many of his most vehement assertions about his wartime activities were contradicted by the testimony of Dr. Sydnor.

7. The Court relies on Dr. Sydnor's testimony that defendant could not have served in the Wiking (Viking) Division of the SS in the places he said he did.

8. The Court also relies on Dr. Sydnor's testimony that a man who did not speak German and who had poor hearing – as consistently maintained by defendant – would not have been in the Wiking Division at all.

9. The testimony of Mr. Earl Mandel, an Immigration and Naturalization Service (INS) naturalization examiner, and defendant's citizenship application itself show that defendant was put under oath and orally questioned about his wartime service during the citizenship application process. Mr. Mandel recorded defendant's oral statements word for word, in an affidavit (government's exhibit 8), and after satisfying himself that defendant understood these statements, had defendant acknowledge the affidavit with his signature. Mr. Mandel adhered to proper INS standard operating procedures in

reviewing defendant's petition for naturalization and in taking an oral affidavit in this manner.

10. In this sworn affidavit, defendant clearly stated that he spent all of his time in the army on the front lines fighting the Russians, and that he never worked in a concentration camp or sent anyone to a concentration camp.

11. Based on the testimony, the government's exhibits, and the specific findings discussed above, this Court concludes that the government has carried its burden of showing clearly, convincingly and unequivocally that the defendant was a guard at the Auschwitz and Sachsenhausen concentration camps for some period of time.

12. Based on the testimony, the government's exhibits, and the specific findings discussed above, this Court concludes that the government has carried its burden of showing clearly, convincingly and unequivocally that defendant made misrepresentations about his wartime activities in his oral statements to naturalization examiner Earl Mandel during the citizenship application process.

CONCLUSIONS OF LAW

1. The government bears the burden of showing by clear, unequivocal and convincing evidence that the defendant's citizenship should be revoked. *Fedorenko v. United States,* 449 U.S. 490, 505 (1981).

2. The Court finds that service as a guard in a concentration camp or escorting prisoners between concentration camps such as Auschwitz and Sachsenhausen is a material fact affecting the decision to award citizenship. In *Kungys v. United States*, 485 U.S. 759 (1988), the United States Supreme Court held that facts concealed or misrepresented by an alien in applying for citizenship are material if, upon disclosure, they predictably would be capable of affecting the decision of the INS.

3. Defendant's statements made to Mr. Mandel and recorded in defendant's affidavit were material misrepresentations made by defendant under oath, in writing and orally, for the purpose or procuring citizenship.

4. Based upon all of the evidence before the Court – including the government's exhibits, testimony by expert historian Dr. Charles W. Sydnor, Jr., and testimony by survivors of concentration camps and prisoner transports, Professor Thomas Buergenthal and Mrs. Bernice Shapiro – about the horrible activities occurring in these concentration camps and during transports and evacuations, along with the testimony of former INS naturalization examiner Mr. Earl Mandel, the Court finds that the misrepresentations made by Mr. Hammer about his service as a guard at Auschwitz or on prisoner transports were material and would very likely have affected the decision to grant citizenship.

5. For these reasons, the court revokes Mr. Hammer's citizenship pursuant to Section 340(a) of the INA., 8 U.S.C. § 1451(a) on the grounds that Mr. Hammer procured his naturalized citizenship by concealment of material fact or by willful and material misrepresentation.

6. Since the finding that defendant made willful, material misrepresentations is dispositive, the Court need not reach the allegations in Counts II and III of the complaint. Accordingly, it is

ORDERED, ADJUDGED, and DECREED that defendant Ferdinand Hammer, a/k/a/ Fred Hammer, a/k/a/ Ferko Hammer, was not and is not a lawfully naturalized citizen of the United States, and that he is not entitled to any of the rights, privileges, or immunities of such citizenship; and, it is further

ORDERED, ADJUDGED, and DECREED that the order of the United States District Court, Eastern District of Michigan, Southern Division, in Detroit, Michigan, dated October 29, 1963, admitting defendant Ferdinand Hammer to United States citizenship is hereby declared null and void and the Clerk of this Court is directed to take action so that the records of this Court shall reflect this Judgment; and, it is further

ORDERED, ADJUDGED, and DECREED that defendant Ferdinand Hammer's Certificate of Naturalization No. 8636310 is hereby cancelled and set aside; and, it is further

ORDERED, ADJUDGED, and DECREED that defendant Ferdinand Hammer is hereby directed to surrender and deliver within ten (10) days of the date of this Judgment to the Attorney General of the United States his

Certificate of Naturalization No. 8636310 and all expired and unexpired United States passports.

HORACE W. GILMORE
HORACE W. GILMORE
Senior District Judge

Date: JUN 21 1996

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF SPECIAL INVESTIGATIONS
AND
IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES OF AMERICA:

FILE A08 865 516

In the Matter of

FERDINAND HAMMER,
a/k/a Fred Hammer
a/k/a Ferko Hammer,
12329 DeGrove
Sterling Heights, Michigan 48077

________________________________/

RELATOR'S ANSWER TO ORDER TO SHOW CAUSE

(Filed Jan. 14, 1997)

NOW COMES, FERDINAND HAMMER, by and through his attorneys, BUFALINO AND PALAZZOLO, P.C., by WILLIAM E. BUFALINO, II, and in answer to the Order to Show Cause, states as follows:

1. In answer to paragraph 1 of the Show Cause, Relator denies the same because the same is untrue.

2. In answer to paragraph 2 of the Show Cause, Relator denies the same because the same is untrue.

3. In answer to paragraph 3 of the Show Cause, Relator admits the same because the same is true.

4. In answer to paragraph 4 of the Show Cause, Relator denies the same because the same is untrue.

5. In answer to paragraph 5 of the Show Cause, Relator denies the same because the same is untrue.

6. In answer to paragraph 6 of the Show Cause, Relator denies the same because the same is untrue.

7. In answer to paragraph 7 of the Show Cause, Relator denies the same because the same is untrue.

8. In answer to paragraph 8 of the Show Cause, Relator denies the same because the same is untrue.

9. In answer to paragraph 9 of the Show Cause, Relator denies the same because the same is untrue.

10. In answer to paragraph 10 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

11. In answer to paragraph 11 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

12. In answer to paragraph 12 of the Show Cause, Relator denies the same because the same is untrue.

13. In answer to paragraph 13 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

14. In answer to paragraph 14 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

15. In answer to paragraph 15 of the Show Cause, Relator denies the same because the same is untrue.

16. In answer to paragraph 16 of the Show Cause, Relator denies the same because the same is untrue.

17. In answer to paragraph I7 of the Show Cause, Relator denies the same because the same is untrue.

18. In answer to paragraph 18 of the Show Cause, Relator denies the same because the same is untrue.

19. In answer to paragraph 19 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

20. In answer to paragraph 20 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

21. In answer to paragraph 21 of the Show Cause, Relator denies the same because the same is untrue.

22. In answer to paragraph 22 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

23. In answer to paragraph 23 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

24. In answer to paragraph 24 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

25. In answer to paragraph 25 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

26. In answer to paragraph 26 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

27. In answer to paragraph 27 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

28. In answer to paragraph 28 of the Show Cause, Relator neither admits nor denies the allegations contained therein.

WHEREFORE, Relator hereby requests that this Order to Show Cause be dismissed.

BUFALINO AND PALAZZOLO, P.C.

BY: /s/ William E. Bufalino
WILLIAM E. BUFALINO, II
(P11360)
Attorney for Relator
33830 Harper Avenue
Clinton Township,
Michigan 48035
(810) 415-1200

Dated: 13 January 1997

SPECIAL AND AFFIRMATIVE DEFENSES

NOW COMES, **FERDINAND HAMMER**, by and through his attorneys, BUFALINO AND PALAZZOLO, P.C., by WILLIAM E. BUFALINO, II, for his Special and Affirmative Defenses, states as follows:

1. The special and affirmative defenses herein are to be incorporated by reference in Relator's Answer.

2. At all times, Relator acted properly and reasonably and in a accordance with all laws, rules and regulations.

3. The claims are barred in whole or in part by the applicable statutes of limitation.

4. The claims are barred in whole or in part by the doctrine of laches and estoppel.

5. The claims are barred by release and waiver.

6. The claims are barred in whole or in part for failure to mitigate its damages.

7. The parties are barred from equitable relief due to the doctrine of unclean hands.

8. The claims are barred in whole or in part since the claim is not timely or properly brought; that no appropriate demand or notice was given to Relator for any participation in alleged response actions or payment of response costs.

9. That the claims violate the due process rights of Relator.

10. That there was no personal act of assistance or participation in persecutorial acts by Relator.

11. That, at best, Relator only occasionally performed ministerial tasks which by themselves cannot be considered oppressive.

12. That the Fifth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law".

13. That the Eighth Amendment to the United States Constitution forbids "cruel and unusual punishment".

14. That the prosecution of persons of crimes committed as many as fifty years in the past cannot help but raise serious, and perhaps unique, questions of procedural due process.

15. That the evidence is stale.

16. That the source of evidence is based on, for most part, evidence accepted from the Soviet Union which has in many times been proven to be false.

17. That the claims are stale and that it is difficult to maintain stale evidence because of lost evidence, death of witnesses, the imperfect recollection of remaining witnesses; and/or the destruction of documents, making it impossible to establish the truth.

18. That the purpose of the Displaced Persons Act, enacted in 1948, allowed European refugees of World War II to gain admission to the United States despite traditional immigration quotas. The Displaced Persons Act allowed individuals displaced from their native lands during World War II to find a haven in the United States, because these individuals could not return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions. The Displaced Persons Act excluded those who persecuted civilians and if an individual made misrepresentations on his admission application for the United States, which were discovered prior to admission, he could not enter.

19. That an official of the International Refugee Organization initially determined whether each person seeking admission to the United States qualified as a displaced person.

20. That after that determination, an official of the Displaced Person's Commission interviewed the applicant to decide that he was eligible under the Displaced Persons Act.

21. That a vice-council from the State Department would than make a decision on the given applicant.

22. That the Immigration and Naturalization Service made certain, through reviewing the case, that the individual was admissible under the United States Immigration Law.

23. That once an individual gained admission into the United States under the Displaced Persons Act, he had the opportunity to become a naturalized citizen of the United States after living continuously here for five years, and exhibiting "good moral character" during that period.

24. That Relator made an application for naturalization, and disclosed, once again under oath, past activities, organizational affiliations, and military service.

25. The INS also interviewed him under oath and questioned him extensively about his past. This occurred in 1962.

26. That the United States Congress, aware of the presence of Nazi war criminals in the United States, in 1978 enacted the Holtzman Amendment to insure that no Nazi criminals would find a haven from their crimes in the United States.

27. That the Holtzman Amendment, in part, provides for the deportation of any alien who, during World

War II, in association with the Nazi government of Germany, "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion".

28. That the term "Holtzman Amendment" refers to five sections of the United States Code: 8 USC 1182(a)(33); 8 USC 1182(d)(3); 8 USC 1251(a)(19); 8 USC 1253(h); 8 USC 1254(e).

29. That pursuant to 8 USC 1253(h) (1982) the attorney general can withhold deportation if he or she "determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

30. That the Relator no longer has a native country, since his native country of Yugoslavia has been extinguished.

31. That the Relator did not make "wilful, material misrepresentations" on his entry forms.

32. That the INS must show that such misrepresentatins are material.

33. That the Holtzman Amendment constitutes a Bill of Attainder.

34. That a Bill of Attainder is an act of Congress which inflicts punishment without a judicial trial.

35. That the United States Constitution provides in Article I, Section 9, that no Bill of Attainder or ex post facto law shall be passed.

36. That the documents relied upon by the INS are of questionable authenticity.

37. That the Relator considers his American citizenship as a precious right.

38. That a miscarriage of justice may occur because of suggestive identifications; stale evidence; and unreliable Soviet source evidence.

39. That the INS should consider the following factors in deciding on the reliability of identification:

A. The opportunity of the witness to view the Relator at the time of the incident,

B. The witnesses' degree of attention,

C. The accuracy of his prior description of the Relator,

D. The level of certainty demonstrated at the confrontation,

E. The time between the crime and the confrontation,

40. That memory problems associated with witnesses of advanced age render their testimony and identification questionable.

41. That such reliability problems conflict with due process.

42. That if the INS feels that the Relator is guilty of war crimes then, under international law, the INS may exercise jurisdiction over alleged war criminals by bringing these criminals to trial within its own territory.

43. That in 1986, the United States Senate ratified the Genocide Convention which was a creation of the

United Nations, confirming that Genocide was a crime under international law.

44. That the Relator has been a model American citizen.

45. That the Relator was as much a victim of the Nazis as were any other individuals.

46. That with the alternative of arrest, torture, imprisonment, and death, staring him in the face, many inhabitants of occupied countries were passively accommodating to the Nazis.

47. That the Relator's acts did not constitute assistance and persecution.

48. That the Relator was not involved actively in any persecution.

49. That the intrinsic consequences of deportation is punishment for crime.

50. That this cause of action violates the statute of limitations.

51. That the statute of limitations are the primary guarantee against overly stale charges.

52. That equitable estoppel should be applied against the INS since it is guilty of affirmative misconduct.

53. This denaturalization proceeding is subject to challenge for arbitrariness, unreasonableness and discrimination.

54. That mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding

the enemy against allies or against the civil population of territory in enemy occupation shall not be considered to constitute "voluntary assistance."

55. That the INS does not hold any evidence that establishes that Relator performed any militia patrol duties or that he was involved directly or indirectly with the persecution of any people.

56. That an international minimum standard on Human Rights has emerged, which has been layed [sic] down in regional and universal instruments, notably in the Universal Declaration of Human Rights of 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, The International Covenant on Civil and Political Rights of 1966 and the American Convention on Human Rights of 1969.

57. That under the United Nations Covenant on Civil and Political Rights, article 14, paragraph 1, requires fundamental fairness by the courts, impartiality and equality of arms.

58. That fairness also entails the requirement that a proceeding be held within a reasonable time.

59. That subjecting Relator to a proceeding more than fifty years after the alleged offenses in question raises issues under this provision, since it is extremely difficult for him to properly represent himself, in view of his old age and the near impossibility to obtain exculpatory documents, witnesses, or even to remember the events under investigation.

60. That clear proof that he lied to the immigration authorities would have to be produced, and such proof

would require a showing of intent, i.e., that he understood a specific question and that he deliberately gave false information.

61. That Relator cannot be penalized for not understanding an ambiguous question or for not volunteering information that was not asked.

62. That at the time of Relator's immigration, he did not understand the English language and that errors may have occurred in translation.

63. That article 14, paragraph 2 of the United Nations Covenant on Civil and Political Rights requires strict adherence to the principal of the presumption of innocence.

64. That article 14, paragraph 2, requires that an accused person be tried without undue delay.

65. That article 12, paragraph 4, provides that no one shall be arbitrarily deprived of the right to enter his own country.

66. That article 17, paragraph 1, guarantees the right to privacy, home family life.

67. That article 17, paragraph 2, stipulates that everyone has the right to the protection of the law against unlawful attacks on one's honor and reputation.

68. That article 26 requires equality before the law.

69. That article 7 stipulates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment.

70. That article 9, paragraph 5 of the International Covenant on Civil and Political Rights provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

71. That the 1948 Universal Declaration of Human Rights has become customary international law.

72. That the following provisions of the Declaration have been breached and/or are about to be breached in this cause of action:

A. Article 9 – which prohibits exile.

B. Article 15 – which stipulates that everyone has a right to a nationality, and that no one shall be arbitrarily deprived of his nationality.

C. Article 17 – which affirms the right to property. Denial of Social Security old age benefits – a mandatory consequence of deportation – would constitute an arbitrary deprivation of property.

D. Article 22 – which provides for the right to Social Security.

73. That under the American Declaration of the Rights and Duties of Man this case violates the following provisions:

A. Article 2 – which guarantees the right to equality before the law.

B. Article 5 – which guarantees the right to protection of honor, personal reputation and private and family life.

C. Article 6 – which guarantees the right to a family and to the protection thereof.

D. Article 16 – which guarantees the right to Social Security.

E. Article 18 – which guarantees the right to a fair trial.

F. Article 19 – which guarantees the right to a nationality.

G. Article 23 – which guarantees the right to property.

H. Article 26 – which stipulates the presumption of innocence, due process of law, protection from cruel, infamous or unusual punishment.

74. That Relator's denationalization and deportation would contravene binding provisions of International Human Rights Law.

75. That any deportation would provide an exceptional hardship.

76. That any deportation proceeding is a denial of due process.

77. That the alleged "misrepresentation" does not warrant deportation.

78. That the Immigration and Nationality Act allows relief from deportation for a person who has physical presence in this country.

79. That the Relator has strong family ties within the United States.

80. That the Relator has been in the United States for a long duration.

81. That the Relator has maintained an exceptional history of employment.

82. That the Relator owns property in the United States.

83. That the Relator has never been charged and/or convicted of a crime.

84. That the Relator has been a model citizen.

85. That the Relator should be granted relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Section 1182(c).

86. That the Relator is eligible for relief under Section 244(a)(91) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1) in that he is of good moral character and his deportation would result in extreme hardship.

87. That the Relator is eligible for discretionary relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Section 1251(a)(1)(H).

88. That there is no reasonable, substantial or probative evidence to verify the claims.

89. That the deportation proceedings are unfair, arbitrary, capricious and contrary to law.

90. That the Judgment rendered in U.S. District Court should be declared void because Relator has been denied his Constitutional rights and that the Judgment is therefore, a nullity. Relator reserves the right to supplement it's [sic] Special and Affirmative Defenses and to amend it's [sic] Answer as additional information becomes known through discovery and through this litigation.

WHEREFORE, Relator respectfully requests that this Honorable Court:

A. Dismiss INS's Order to Show Cause.

B. Declare that Relator is not liable to INS for any costs and attorney fees incurred in bringing this action.

C. Award Relator attorney fees and costs incurred in defending this action.

D. Grant such other relief as this Court deems appropriate.

BUFALINO AND PALAZZOLO, P.C.

BY: /s/ William E. Bufalino
WILLIAM E. BUFALINO, II
(P11360)
Attorney for Relator
33830 Harper Avenue
Clinton Township,
Michigan 48035
(810) 415-1200

Dated: 13 January 1997

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

IN THE MATTER OF	)	File Number A 08 865 516
HAMMER, Ferdinand a.k.a. Fred Hammer, Ferko Hammer	)	**IN DEPORTATION PROCEEDINGS**
RESPONDENT	)	

Charges: **§ 241(a)(4)(D) of the Immigration and Nationality Act of 1952,** to wit: any alien who ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933, and May 8, 1945, under the direction of, or in association with, the Nazi government of Germany, is deportable.

Applications: Advance Waiver of Inadmissibility and Permission to Return to Unrelinquished Domicile as a Lawful Permanent Resident pursuant to § 212(c) of the Act; Withholding of Deportation pursuant to § 243(h) of the Act; and Suspension of Deportation pursuant to § 244(a)(1) of the Act.

ON BEHALF OF THE RESPONDENT

William E. Bufalino, II, Esquire
Bufalino and Palazolo, P.C.
33830 Harper Avenue
Clinton Township, MI 48035

ON BEHALF OF THE GOVERNMENT

Robert Seasonwein, Esquire
Senior Trial Attorney
Lisa Newell, Esquire
Trial Attorney
U.S. Department of Justice
Office of Special Investigations
1001 G Street, NW, Suite 1000
Washington, DC 20530

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondent is a 77-year-old male who was born in Lacarak, Yugoslavia (Croatia) on July 30, 1921 and is a stateless person. He entered the United States as a lawful permanent resident on August 6, 1955. On September 23, 1963, he became a naturalized citizen of the United States. Subsequently, the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of Michigan. ***United States v. Hammer*, 94 CV-74985-DT, slip op. (E.D. Mich. June 21, 1996).** *See* **Exhibit #5.** The Government alleged, *inter alia,* that the respondent illegally procured his United States citizenship by willfully misrepresenting or concealing his World War II service as an armed SS-Waffen Death's Head Battalion guard at the Auschwitz Concentration Camp in Poland and the Sachsenhausen Concentration Camp in Germany; and his service as an armed Death's Head Battalion (SS-*Totenkopfverbaende*) guard during the forced evacuation of concentration camp prisoners between Auschwitz and Sachsenhausen, and the transport and transfer of prisoners between Sachsenhausen and Mauthausen concentration camp in Austria. On June 21, 1996, the United States District Court found in favor of the Government and entered a judgment of denaturalization revoking the respondent's United States citizenship and canceling his certificate of naturalization. *See* **Exhibit #5.** The respondent did not appeal this decision.

On October 31, 1996, the Government commenced deportation proceedings against the respondent, by issuing an Order to Show Cause and Notice of Hearing, hereinafter referred to as "OSC", charging him with deportability on three bases: (1) pursuant to § 241(a)(4)(D) of the Immigration and Nationality act of 1952, 8 U.S.C. 1251(a)(4)(D) (hereinafter referred to as "the Act"), as an alien who, at the Auschwitz concentration camp, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933, and May 8, 1945, under the direction of, or in association with, the Nazi government of Germany; (2) pursuant to section 241(a)(4)(D) of the Act, as an alien who, on the prisoner transport from the Auschwitz concentration camp to the Sachsenhausen concentration camp, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933, and May 8, 1945, under the direction of, or in association with, the Nazi government of Germany; and (3) pursuant to section 241(a)(4)(D) of the Act, as an alien who, at the Sachsenhausen concentration camp, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933, and May 8, 1945, under the direction of, or in association with, the Nazi government of Germany. *See* **Exhibit #1.**

On December 19, 1996, the Court held a pre-trial telephonic conference with the parties. At the conclusion of this conference the Court issued an order directing the respondent to file written pleadings to the allegations and charges contained in the OSC. In addition, the parties were put on notice of the Court's intent to require the parties to file a Joint Pre-Hearing Statement.

On January 9, 1997, the respondent filed his written pleadings to the allegations and charges contained in the OSC. *See* **Exhibit #2.** Although the respondent's answer failed to admit or deny the charges contained in the OSC, he pled to the allegations in the OSC in the following manner: he **Admitted** allegation #3; he **denied** allegations

#1-2, 4-9, 12, 15-18, 21, and he **neither admitted nor denied** allegations #10-11, 13-14, 19-20, and 22-28. *See* **Exhibit #2.** In response to the Government's allegations, the respondent also included in his answer a number of Special and Affirmative Defenses. *See* **Exhibit #2.**

On February 3, 1997, the Court conducted a Master Calendar Hearing in this matter. At the hearing, the respondent, through counsel, denied the factual allegations and charges contained in the OSC. *See* **Exhibit #1.** After pleading to the OSC, respondent, through counsel, stated his intent to seek relief from deportation under § 212(c) (Advance Waiver of Inadmissibility and Permission to Return to Unrelinquished Domicile as a Lawful Permanent Resident); § 243(h) (Withholding of Deportation) and § 244(a) (Suspension of Deportation) of the act. *See* **Exhibit #2.** The Court explained that such applications for relief would not be necessary if the Government failed to prove its case as the respondent would remain a lawful permanent resident. Conversely, if the Government proved its case, such applications would be unavailing as the respondent, having been found deportable pursuant to section 241(a)(4)(D) of the Act, would be statutorily ineligible for any relief under the act. Accordingly, no applications for relief were filed with the Court.

Thereafter, the Court informed the respondent of the privilege of designating a country of deportation, if deportation should be necessary. The respondent declined to designate a country of deportation. The Court designated Croatia as the country of deportation should deportation become necessary. The Court ordered the parties to file a Joint Pre-Hearing Statement on or before

February 25, 1997 and scheduled the case for a merits hearing on March 17, 1997.

On February 25, 1997, the parties filed their Joint Pre-Hearing Statement. *See* **Exhibit #3.** In the Joint Pre-Hearing Statement, the respondent amended his answer to the allegations contained in the OSC by: **(1)** admitting allegations #1-5, and 27-28 and **(2)** denying allegations #6-26. In addition, the Government stated that the sole legal issue in the case was "whether respondent's service as an armed SS Death's Head guard at Auschwitz and Sachsenhausen, or while guarding prisoners when they were transported from Auschwitz to Sachsenhausen, and later from Sachsenhausen to Mauthausen, constituted a participation or assistance in persecution, as proscribed by § 241(a)(4)(D) [of the Act] (Holtzman Amendment)." *See* **Exhibit #3.** The respondent, in the Joint Pre-Hearing Statement, contends that the issue before the Court is "whether respondent's conduct constituted persecution of any person because of race, religion, national origin or political belief." *See* **Exhibit #3.** The respondent reiterated his request for discretionary relief under § 212(c) Advance Waiver of Inadmissibility and Permission to Return to Unrelinquished Domicle as a Lawful Permanent Resident, 243(h) (Withholding of Deportation) and 244(a)(1) (Suspension of Deportation) of the Act. The Government contended that if the respondent was found deportable pursuant to section 241(a)(4)(D) of the Act that he was "*per se*" ineligible for the requested discretionary relief. *See* **Exhibit #3.** Furthermore, the respondent incorporated by reference the Special and Affirmative Defenses set forth in his answer to the allegations contained in the OSC. *See* **Exhibit #3.**

On March 4, 1997, the parties filed a "Supplemental Joint Pre-Hearing Statement", wherein the respondent relied on his special and affirmative Defenses, set forth in his answer to the OSC, to object to the Government's exhibits in support of the allegations and charges contained in the OSC. The Government objected to the respondent's Special and affirmative Defenses. *See* **Exhibit #4.**

On March 17, 1997, the Court conducted a merits hearing. The respondent, through his attorney, appeared before the immigration Court in Detroit, Michigan, to contest the charges of deportability. At this time the respondent again changed his plea to allegation #5 in the OSC. He now denied the allegation.

II. APPLICABLE LAW

A. Burden of Proof in a Deportation Proceeding

The Government bears the burden of proof in a deportation proceeding. It must prove by clear, convincing, and unequivocal evidence, that the respondent is an alien and is deportable as charged. *Woodby v. INS,* 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a). Alienage, as defined under the Immigration and Nationality Act, describes a person who is "not a citizen or national of the United States." Section 101(a)(3) of the Act. For those individuals who have had the privilege of United States citizenship, but have lost their citizenship either through denaturalization or expatriation, the burden is on the party asserting that the citizenship has been lost. Section 349(b) of the Act. Once it is determined that a person has lost his or her citizenship, the person is considered an alien and is, therefore, subject to all requirements under the Act.

In this case, the respondent has admitted that he is a stateless person. Moreover, in a decision that is now final, the respondent was denaturalized and is no longer a citizen of the United States. *See* **Exhibit #5.**

B. Deportability under § 241(a)(4)(D)

In 1978, Congress amended the Act to create a new ground of deportation. This amendment, commonly referred to as the Holtzman Amendment, mandates the deportation of those aliens who, in association with the Nazi government of Germany, ordered, incited, assisted or participated in persecution of any person because of race, religion, national origin or political opinion. Prior to the enactment of the Holtzman Amendment, only those aliens who have entered the United States with immigrant visas acquired under the Displaced Persons Act or the Refugee Relief Act of 1953 could be deported as Nazi collaborators. The intent of this amendment was to provide the Government with an alternative ground to deport these individuals regardless of how they entered the United States. *See* House Report No. 95-1452 at 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4700, 4702.

In 1990, Congress redesignated section 103 as § 241(a)(4)(D) of the Act. *See* § 602 of the Immigration Act of 1990 (November 29, 1990), Pub. L. No. 101-649, 101 Stat. 4978 (hereinafter "IMMACT 90"). Also, included in IMMACT 90 were additional restrictions for aliens found to have persecuted others because of race, religion, national origin, or political opinion in association with the Nazi government of Germany. These restrictions included a new exclusion ground (§ 212(a)(3)(E) of the act), and statutory bars for advance waiver of inadmissibility and permission to return to unrelinquished domicile as a lawful permanent resident (under § 212(c) of the act); withholding of deportation (under § 243(h) of the Act); suspension of deportation (under § 244(a)(1) of the Act); and voluntary departure (under § 244(e) of the Act). Through this initiative, Congress manifested its intent to accord these individuals absolutely no relief or waiver from deportation and to demonstrate their disapproval of persons found to have collaborated in the atrocities committed by the Nazi government of Germany by refusing to harbor them within our borders.

As currently enacted, § 241(a)(4)(D) of the act states that the following persons are deportable if they fall within the class of aliens who:

> "ASSISTED IN NAZI PERSECUTION OR ENGAGED IN GENOCIDE. – Any alien described in clause (i) or (ii) of § 212(a)(3)(E) is deportable."

Clause (i) of § 212(a)(3)(E) states that:

> "PARTICIPANTS IN NAZI PERSECUTIONS OR GENOCIDE–
>
> (i) PARTICIPATION IN NAZI PERSECUTIONS. – Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with –
>
> (I) the Nazi government of Germany,
>
> (II) any government in any area occupied by the military forces of the Nazi government of Germany, or

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany.

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion is excludable."

III. SUMMARY OF EVIDENCE PRESENTED

A. Government's Case Against the Respondent

The Government contends that the respondent's World War II activities as a Waffen-SS Death's Head Battalion guard constituted participation or assistance in persecution as proscribed by § 241(a)(4)(D) of the Act. Therefore, the Government claims that the respondent is deportable from the United States. Although the Government did not present any live witnesses on its behalf, it did offer over 2,000 pages of proposed exhibits in support of this position. Included in these exhibits was the transcript of the prior district court denaturalization case containing the testimony of several witness, both expert and lay, as well as the bulk of the evidence it presented in the denaturalization case. After an extensive and exhaustive review of each of the government's exhibits, the Court found them to be relevant and probative to the instant proceedings. Accordingly, the Court admitted **Exhibits #6-33** into evidence. *See* **Appendix A.** These exhibits correspond to the allegations contained in the OSC. *See* **Appendix B.**

The Government argues that these exhibits, when taken cumulatively, demonstrate by clear, convincing and unequivocal evidence that the respondent, a former member of the Waffen-SS, served as a armed guard at the Auschwitz and Sachsenhausen concentration camps, and that he guarded prisoners during transport between Auschwitz and Sachsenhausen concentration camps, and later between Sachsenhausen and Mauthausen. As such, he engaged in persecution of others within the definition of § 212(a)(3)(E), and is thus deportable under § 241(a)(4)(D) of the Act. With regard to the charges, the Government relies on a plethora of evidence, including the testimony of two concentration camp survivors, to prove that concentration camp guards, by the very nature of their role within the camp, engaged in persecution.

In support of its claim that the respondent was himself a concentration camp guard, the Government points to several transfer lists of Waffen-SS concentration camp guards which identify the respondent by both name and birth date. The Government notes that these lists all contain the identical information and are highly reliable, since they were acquired from various independent sources in Poland, the Soviet Union and the United States. Moreover, the Government argues that the respondent's testimony regarding his activities during World War II is not only self-serving and internally inconsistent with his prior statements, but is also directly contradicted by the testimony of the Government's expert witness during the district court action, or Charles Synder. Further, the Government argues that the respondent's testimony is belied by the final judgment in the U.S. District Court denaturalization case. *See* **Exhibit #5.** Consequently, the Government urges the Court to disregard the respondent's testimony and find him deportable as charged.

B. Respondent's Rebuttal Case

The respondent contends that he was never at a concentration camp and that he never engaged in any persecution of individuals. Instead, he claims that during World War II, he was fighting at the Russian front as a member of the Waffen-SS Wiking division. Indeed, according to his testimony, he had never heard of the concentration camps or the atrocities committed there until he arrived in the United States. In support of his position, the respondent presented the live testimony of two witnesses as well as testifying on his own behalf. The only documentary evidence he submitted in support of his position was a copy of an October 19, 1951, U.S. Displaced Persons Commission Headquarters internal memo stating that ethnic Germans in Croatia were automatically drafted into the Waffen-SS. Although the respondent filed the evidence out of time and did not include a certificate authenticating the memo, the court admitted it into evidence as **Exhibit #34.** The respondent's two witnesses testified as follows:

Ms. Elizabeth Schneider, of Sterling Heights, Michigan, appeared on behalf of the respondent as his first witness. Ms. Schneider began her testimony by stating that both she and the respondent are originally from the village of Lacarak, Yugoslavia and that she has been acquainted with the respondent since 1944, when she was 15 years old. Ms. Schneider stated that she first met the respondent in late 1944, while he was on leave visiting his home. She admitted that he was wearing an SS uniform at the time of their acquaintance, but did not recall seeing any type of military insignia on the uniform, not even a skull and crossbones (the Death's Head Battalion regalia). The witness claimed that while she was living in Yugoslavia, she had never heard of the Nazi party, concentration camps or of the Death's Head Battalion. Only when she arrived in the United States in 1956 did she become aware of the existence of the Nazi party. Furthermore, Ms. Schneider testified that all three of her brothers were drafted involuntarily into the service. When asked what would happen if men refused to join the military, Ms. Schneider stated that they would be shot or sent to the concentration camps. Ms. Schneider could not, however, name a single person of her acquaintance that had been shot nor had she ever seen anyone get shot.

On cross examination, Ms. Schneider was questioned regarding the discrepancy between her statement that she had never heard of concentration camps and her claim that men would be sent there if they refused to join the military. Ms. Schneider then admitted that although she was not familiar with concentration camps until she arrived in the United States, she stated that she heard after the fact that men would be sent to concentration camps if they refused to be conscripted into the army. She also acknowledged that she was not familiar with any specific branch or division of the military and could not even name the branches in which her brothers served. Moreover, she testified that she had never traveled with the respondent, had never visited him while he was in the military and, in fact, never saw him again until she arrived in the United States.

Respondent's second witness, Mr. Josef Hajnal of Eastpointe, Michigan, was a former member of the Waffen-SS, North Division, (ski patrol), in 1942 and is originally from Bapska, Yugoslavia (now Croatia). Mr. Hajnal testified that although he did not personally know the respondent until his arrival in the United States, he has known him for over 40 years. According to Mr. Hajnal, during the war, the Waffen-SS was actively drafting in Croatia. He originally claimed that Waffen-SS members had to be of a certain height (6 ft) and have blond hair and blue eyes. As the war progressed, however, the Waffen-SS would draft other men, regardless of their physical appearance, into service. Mr. Hajnal stated that he lied about his age to avoid being drafted, and that it was common knowledge that the Waffen SS would visit men's homes and give the families a hard time until they joined. In fact, he claimed that he had heard of men being shot, although he did not personally know anyone or see anyone get shot for not joining. He did, however, see people "disappear."

Mr. Hajnal also claimed that he had never heard of the Nazi party, concentration camps or of the Death's Head Battalion until arriving in the United States. While under oath, Mr. Hajnal insisted that to his knowledge, the Waffen-SS did not have a "Death's Head Battalion" division. He also announced that guards were required to shoot or be shot themselves. Mr. Hajnal, however, acknowledged that he had never seen a guard get shot.

On cross-examination, the witness again stated that he had never heard of the Nazi party, concentration camps or the Death's Head Battalion. When asked if he had heard of the Totenkopfverbaende division, however, he said yes. He also admitted to possessing a rifle during his service and having a blood-type tattoo, although the tattoo had since faded.

The respondent also testified on his own behalf. He began his testimony by recounting personal information regarding his wife, children and grandchildren. He then discussed the discrepancy regarding his date of birth. According to the respondent, his parents had always told him he was born in 1922, but when his wife returned to Yugoslavia and obtained a copy of his birth certificate it stated 1921. He has since then used his 1921 birth date.

Next, the respondent discussed his activities during World War II. He claimed that in 1942 he received a letter directing him to appear for service in Mitrovica, a larger city in northern Croatia. Respondent informed the Court that had he not appeared, he would have been killed and that there would have been reprisals against his family. The respondent stated that a colleague also received the same letter and was later killed for refusing to report for service. Respondent, then, felt compelled to follow orders and went to Mitrovica. He subsequently joined the Waffen-SS on October 19, 1942, despite a hearing disability.

After his conscription, the respondent was sent to Prague, Czechoslovakia were he was forced to attend German language classes. Only after he completed his classes, sometime in 1943, was he issued a uniform. The respondent described the uniform as greenish-blue in color with an "SS" insignia. He stated that it did not contain a skull and crossbones.

Sometime in 1943, while still stationed in Prague, he was sent to Katowice, Poland for ear surgery. He remained in Poland for 3-5 months. After his surgery, he returned to Czechoslovakia for 3 months training. He then returned to Katowice for a second time. He remained there, working in the hospital kitchen, for several months. From Katowice he was sent to Krakow, Poland on the Russian/Ukraine border.

For the remainder of the war (1943-44), the respondent testified that he served on the Russian front, participating in fighting on the front lines. He recalled spending most of the time in small villages as well as in the larger cities of Kiev, Odessa and Krakow. The respondent described the fighting in 1944 as "going back, back, back." At the end of the war, in 1945, the respondent testified that he feared for his life if he were captured. Consequently, he abandoned his uniform and ran away into the mountain wilderness with 3 other soldiers, two of whom were named Franz Dank and Fedor Gregory. According to the respondent, he escaped all the way from the Russian front to Austria, where he swam across the Danube river to reach safety.

Once in Austria, the respondent worked as a laborer for several farmers. In 1946, he claimed he obtained an ammunition dumping job with the United States government for $.50 an hour. He worked for the U.S. government for nearly 3 years, until he was laid off through no fault of his own. He also married and had two children. In 1955, he went to the United States.

The respondent declared that he had never been at Auschwitz, Sachsenhausen, or Mauthausen or Orienburg concentration camps. He stated that he had never performed any duties as a concentration camp guard; had never escorted prisoners to labor details; had never guarded prisoners at work sites; had never worked at a guard watch tower; had never guarded prisoners during transportation between camps; and had never even worked as a guard during his military service. He admitted having knowledge of the existence of the Death's Head Battalion as the "best soldiers" in the Waffen-SS, but claimed he was never one of them.

Upon further questioning, the respondent acknowledged that he did guard prisoners, but "they were Russians, not Jews." He described his duties over the Russian prisoners as simply keeping an eye on them as they worked at the labor sites. He admitted to carrying a rifle while guarding the prisoners, but stated that he never shot a prisoner and that he was not under standing orders to shoot them. To the best of his knowledge, the Russians "were treated right." He said they were never punished, beaten, murdered or hurt in any way.

Under cross-examination, the respondent acknowledged that he had standing orders to shoot the Russian prisoners if they attempted to escape. He stated, however, that he never killed anyone. He admitted knowing about concentration camps, but was unaware of what was going on at the camps. He denied knowing that Russians were also being exterminated at the camps. Respondent claimed to never have seen people wearing yellow stars. In fact, he "never saw anything."

The respondent was unable to give the name of his commander in the Wiking division. He was also not able to name a single battle in which he fought. He stated that he was not aware of any SS policy of prohibiting disabled men from fighting at the front lines. Although he was trained to use a rifle and a machine gun, he claimed he never shot anyone. He admitted receiving a blood-type tattoo but recounted that he removed it for fear that the Russians might find it. Finally, he vehemently denied ever being in southwestern Poland or serving as a guard at a concentration camp.

Before concluding his rebuttal case, the respondent argued that the Court should not apply the doctrine of collateral estoppel in the instant case. He argued that the United States District Court case addressed the issue of the respondent's misleading the INS to obtain his naturalization, not the issue of whether his World War II activities constituted persecution within the meaning of § 241(a)(4)(D) of the Act. Moreover, he claimed that the Government failed to meet its burden as it did not present any direct evidence that the respondent personally committed or was involved in any of the alleged atrocities. As a final matter, he claimed the Holtzman amendment creates an ex post facto problem and that the Court, therefore, should not find the respondent deportable as charged.

IV. ANALYSIS

A. The Legal Effect of the Judgment in the Denaturalization Proceeding

In order for the judicially-developed doctrine of collateral estoppel to be applied in a deportation proceeding there must have been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect and the parties must have been accorded a full and fair opportunity to litigate the issues in the prior suit. *Matter of Fedorenko,* 19 I&N Dec. 57, 67 (BIA 1984). In addition, the use of collateral estoppel must not be unfair to the parties. *Id. See also United States v. Stauffer Chemical Co.,* 464 U.S. 165 (1984); *U.S. v. Mendoza,* 464 U.S. 154 (1984); *Schellong v. INS,* 805 F.2d 655 (7th Cir. 1986).

These prerequisites are satisfied in the respondent's case. The United States District Court's denaturalization judgment entered on June 21, 1996 (*See* **Exhibit #5**) was not appealed and is, therefore, a final judgment. Accordingly, the District Court judgment is sufficiently firm to be given conclusive effect. The denaturalization proceeding, during which the respondent was represented by counsel, afforded the respondent a full and fair opportunity to litigate the issue of whether he served as an armed guard in the Waffen-SS Death's Head Battalion; and whether he was a guard at the Auschwitz and Sachsenhausen concentration camps; and whether he guarded prisoners between Auschwitz and Sachsenhausen concentration camps, and later between Sachsenhausen and Mauthausen concentration camps. Moreover, all evidence admitted during the denaturalization proceeding was subject to strict judicial rules of evidence. The respondent and the Government, who were the parties in the denaturalization proceeding, are also the parties in this proceeding, and the Government's burden of proof in the denaturalization proceeding was the same as its burden in this proceeding. *See Woodby v. INS*, 385 U.S. 276, 285-86 (1966); *Matter of Fedorenko, supra*. Moreover, both the respondent and the Government reasonably could have foreseen that the issues raised in the denaturalization proceeding might be raised in a subsequent deportation proceeding.

The respondent has argued against the application of the doctrine of collateral estoppel on the ground that the denaturalization proceeding was arbitrary, unreasonable and discriminatory and denied him of his constitutional rights. *See* **Exhibit #2.** Respondent cited no cases nor did he provide any evidence to support his arguments. Moreover, the respondent did not challenge or appeal the judgment of the U.S. District Court. Having considered the case law in this area, this Court finds the respondent's arguments and opposition to applicability of the doctrine of collateral estoppel to be without merit. The Court is satisfied that the respondent received a full and fair opportunity to litigate the issues resolved by and necessary to the judgment in his denaturalization proceeding. *See* **Exhibit #5.** Thus, it is the finding of this court that the doctrine of collateral estoppel is applicable to the issues resolved by the denaturalization proceeding and that application of the doctrine of collateral estoppel is not unfair to the respondent. *See Montana v. U.S.*, 440 U.S. 147, 164 (1979).

Under the doctrine of collateral estoppel, the respondent's denaturalization judgment conclusively establishes the "ultimate facts" of this deportation proceeding, *i.e.*, those facts upon which the respondent's deportability and eligibility for relief from deportation are to be determined and precludes reconsideration of issues of law resolved by the prior judgment so long as the issues in the prior suit and the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. *The Evergreens v. Nunan*, 141 F.2d 927, 930-31 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); *Matter of Fedorenko, supra.*

There are two general categories of facts which this Court considers to be "ultimate facts" in this case. The first category consists of facts which pertain to the respondent's citizenship and nationality. These are "ultimate facts" because they are relevant to the issue of the respondent's alienage. The second category consists of facts which pertain to the respondent's activities during World War II, and, in particular, to activities at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps. These are "ultimate facts" because they determine the respondent's deportability under section 241(a)(4)(D) for assisting the Nazis in persecuting others. In addition, these facts are relevant to the respondent's eligibility for various forms of relief from deportation.

The following facts established by the denaturalization judgment come within one of these categories:

1. The respondent was born on July 30, 1921;
2. The respondent had the rank of "Sturmmann" and served during World War II, as an armed Waffen-SS Death's Head Battalion guard at the Auschwitz and Sachsenhausen

concentration camps established and operated by forces of the Nazi government of Germany;

3. The respondent served as an armed Waffen-SS Death's Head Battalion (SS-*Totenkopfverbaende*) guard for prisoner transport between Auschwitz and Sachsenhausen concentration camps, and prisoner transport between Sachsenhausen and Mauthausen concentration camps;
4. During respondent's service as an armed Waffen-SS Death's Head Battalion guard at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps, "horrible mistreatment was meted out to inmates of these camps." *See* **Exhibit #5.**

Since the foregoing facts found in the denaturalization proceeding are also "ultimate facts" in this case, the Court considers them to be conclusively established by operation of the doctrine of collateral estoppel.

B. Respondent's Deportability

(1) Credibility

During these proceedings the court carefully listened to and observed the demeanor of all witnesses in this case, including the respondent. With respect to Ms. Schneider and Mr. Hajnal, the Court found no reason to question their sincerity regarding their testimony. The Court, however, does question the reliability of their observations. Neither witness proffered by the respondent was able to give any substantial or significant evidence with respect to the Respondent's service during World War II. Ms. Schneider was an adolescent during her brief encounter with the respondent and was only able to state that the respondent wore a uniform while on leave during his visit home. This only demonstrates that the respondent was in the military and was, to some extent, given freedom to visit his family during his military service.

Mr. Hajnal, on the other hand, assisted the Court by recounting his experience with the Waffen-SS, but was unable to give information about the respondent's personal service within the Waffen-SS. The Court finds them both credible.

More troubling, however, is the Court's assessment of the respondent's credibility. The respondent's testimony was neither rational, consistent, coherent, inherently persuasive nor sufficiently detailed. The Court took special interest in observing the manner in which the respondent testified, to wit: the tone of his voice, his mannerism while testifying, and the way in which he responded to questions. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). His testimony was inconsistent, improbable and implausible. For example, after he filed his written answer to the OSC in which he admitted he was an armed guard at Auschwitz, Sachsenhausen, and Mauthausen (*See* Exhibit #2), at his deportation proceedings he changed his plea to this allegation (this was allegation #5 in the OSC) by denying that he was ever a guard at the abovementioned concentration camps. He offered no rational basis for his changed plea to this allegation.

Further, the respondent testified under oath that he had never been a guard at Auschwitz, Sachsenhausen or Mauthausen concentration camps, yet he offered no explanation as to why his testimony contradicted the United States District Court findings in the final Judgment in his denaturalization proceedings. The respondent testified that he never performed any duties as a concentration camp guard, nor escorted prisoners. However, upon further questioning he acknowledged that he did guard prisoners. The respondent claimed not to have been an armed guard during his military service, yet upon further questioning he admitted to being trained to use a rifle and machine gun and that he, in fact, carried a rifle while guarding prisoners.

The respondent also claimed to have been in the Wiking division, yet he could not give the name of his commander nor was he able to name a single battle in which he fought. Moreover, the U.S. District Court in his denaturalization proceeding rejected this contention and the respondent failed to offer any explanation of his contrary claim.

Further, the respondent was confronted with roster lists of Waffen-SS armed Death's Head Battalion guards serving at the Auschwitz, Sachsenhausen, and Mauthausen (prisoners transport) concentration camps which listed him by name, rank and birth date. The only explanation the responded offered was that the individual listed was not him and that there were other persons named Ferdinand Hammer. Despite his conclusive statements, the court closely reviewed each of these roster lists, and notes that the rosters contain the name: **Ferdinand**

> **Hammer**, the rank: **SS-Sturmmann**, date of birth: **July 21, 1921**, and his name appeared on each of the roster lists as **number 16**. The respondent admitted that he was born on July 21, 1921, the United States District Court found that the respondent was born on July 21, 1921, and while respondent contends there were other persons named Ferdinand Hammer, he offered no explanation for the roster lists containing his correct date of birth. *See* **Exhibits #6(e), #16, #17(a), #17(b), #18, #19, and #31, #32, & #33**. In addition, the United States District Court found that these documents (the roster lists) clearly established that the respondent was a Waffen-SS Death's Head Battalion guard at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps. *See* **Exhibit #5**.

For the abovementioned reasons, this Court finds that the respondent's testimony was not credible.

(2) Deportability Under § 241(a)(4)(D) of the Act

The question of the respondent's deportability pursuant to § 241(a)(4)(D) of the Act was not actually litigated in the denaturalization proceeding and therefore collateral estoppel does not automatically resolve this issue. Nevertheless, the facts conclusively established by collateral estoppel show the respondent to be deportable pursuant to § 241(a)(4)(D) of the Act. That section provides for the deportation of aliens who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with, the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. The fact that the respondent's activities as a Nazi SS Death's Head Battalion guard included the period of December 7, 1944 to February 13, 1945 clearly establishes that he falls within the period of time specified by section 241(a)(4)(D) of the Act.

The element of that section which is at issue is **whether the respondent's service as a member of the Waffen-SS Death's Head Battalion Guard at the Auschwitz and Sachsenhausen concentration camps, and while guarding prisoners when they were transported between Auschwitz and Sachsenhausen concentration camps, and later between Sachsenhausen and Mauthausen concentration camps, constituted assistance or participation in the persecution of any person because of race, religion or political opinion, as described in section 241(a)(4)(D) of the Act.**

(a) "Assisted or Otherwise Participated in the Persecution of Any Person"

The term "persecution" as used in § 241(a)(4)(D) of the Act contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, *i.e.*, race, religion, national origin, or political opinion. *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), *rev'd. on other grounds, Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985). The harm or suffering inflicted may take various forms but it most certainly includes physical confinement. *Id.* The facts established by collateral estoppel show that a substantial number of persons were confined at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps while respondent served as a SS-Waffen Death's Head Battalion guard. This included political prisoners, Jews and others, where **"horrible mistreatment was meted out to inmates of these camps."** *See* **Exhibit #5.** In addition, the evidence at the hearing established that during the time of the respondent's service as an armed Waffen-SS Death's Head Battalion guard at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps, prisoners, especially, Jews, were subjected to such forms of persecution as corporal punishment, torture, starvation, forced labor, discrimination, poor hygienic and sanitary conditions, overcrowding, and mass murder **(Auschwitz – Exhibits #5, #6(a), #6(d), #6(j), #7(b), #7(c), #9(a), #9(b), #12, #13(b), #14(a), #15, #17(a), #18, #27, #28, #29, & #30; Prisoners transport between Auschwitz to Sachsenhausen – Exhibits #5, #6(e), #6(f), #14(b), #14(c) #15, #16, #17(b), #18, & #19; Sachsenhausen – Exhibits #5, #6(e), #6(f), #14(b), #14(c), #15, #16, #17(b), #18, & #19; Sachsenhausen – Exhibits #5, #6(d), #6(e), #7(a), #8, & #9(b); Prisoners transport between Sachsenhausen to Mauthausen – Exhibits #5, #6(d), #6(f), #6(g), #15, #16, #17, #18, & #19).** *See also,* **Exhibit #28.**

The imprisonment of these inmates at Auschwitz, Sachsenhausen, and Mauthausen concentration camps clearly constituted "persecution" within the meaning of

§ 241(a)(4)(D) of the Act. *See Matter of Fedorenko,* 19 I&N Dec. 57 (BIA 1984); *see also, U.S. v. Schmidt,* 923 F.2d 1253 (7th Cir. 1991) (finding that "[t]he grim history of Sachsenhausen has been well-documented by historians and tribunals that have tried Nazi War Criminals").

The respondent contends that he was never a guard at a concentration camp and that he never engaged in any persecution of individuals. He claimed that he was unaware that prison guards engaged in acts of brutality. He claims that he only occasionally performed ministerial tasks which by themselves cannot be considered oppressive. He further claimed that his acts did not constitute either assistance or persecution. He further contended that he was not actively involved in any persecution and that with arrest, torture, imprisonment, and death, staring him in the face he, like many inhabitants of occupied countries, was passively accommodating to the Nazis. He claimed that he was as much a victim of the Nazis as was any other individual. The court rejects these claims. The record is replete with evidence and examples of the poor, inhuman treatment of prisoners by Waffen-SS guards. This treatment included oppressive living conditions, forced labor and severe punishment inflicted upon prisoners at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps during the time the respondent served there.

Furthermore, deportability under § 241(a)(4)(D) of the Act does not require that the respondent have engaged in acts of brutality against the prisoners. Section 241(a)(4)(D) makes an alien deportable if he merely "assisted" in the persecution of others. It is irrelevant whether the prison guards themselves committed acts of brutality against the prisoners or whether a guard's actions constitutes "voluntarily" assistance under circumstances where a person aides the enemy against allies. *See Maikovskis v. INS*, 773 F.2d 435 (7th Cir. 1985) (holding that the government does not need to establish the alien's personal motivation); *Fedorenko v. U.S.*, 449 U.S. 490 (1981) (holding that the alien's voluntariness is not an issue under the Displace Persons Act); *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987) (concluding that personal involvement in the atrocities need not be proven to meet the Holtzman amendment requirements). The respondent's involvement as a Waffen-SS Death's Head Battalion guard at the Auschwitz, Sachsenhausen concentration camps as well as a guard assigned to prisoner transports between Auschwitz and Sachsenhausen and between Sachsenhausen and Mauthausen concentration camps constitutes assistance in persecution within the meaning of section 241(a)(4)(D) of the Act because his actions aided the Nazis in their confinement of the prisoners at the camps. *See Matter of Fedorenko, supra.*

(b) "Persecution Because of Race, Religion . . . or Political Opinion"

The facts established by collateral estoppel, through the testimony of Dr. Charles W. Syndor at the denaturalization proceedings (*See* **Exhibit #6(a)-(m))** and the evidence admitted into evidence at the respondent's deportation hearing show that the Auschwitz, Sachsenhausen, and Mauthausen concentration camps confined in particular Jews, and other persons who were deemed to be political, and religious opponents to the Nazi government.

The evidence adduced at the deportation hearing and the testimony of the Government's expert, Dr. Charles W. Syndor, Jr., in respondent's denaturalization proceeding established that almost 500,000 Hungarian Jews were murdered. The evidence also established that between 1942-1945 the so-called "Final Solution of the Jewish question " referred to the interagency, bureaucratic planning and conduct of the extermination of the European Jews by the Nazis. In addition, the evidence established that Jewish prisoners were punished more severely than other prisoners in the camps. Jewish prisoners were discriminated against in the camps; they were particularly endangered; they were not considered to be human beings but rather "parasites," "vermin," or "bacillus carriers," who had to be destroyed. Jews were constantly exposed to harassment and mistreatment to an even greater degree than the other prisoners, and they were subject to harsher working conditions. *See* **Exhibits #6(d), #28, #13(b), #14(c), & #30.**

The respondent's motivations for his actions as an armed Waffen-SS guard are irrelevant because it would not alter the fact that he "assisted" in the persecution which occurred "because of" official policies directed against people of the Jewish race and religion, of other religions, and with different political beliefs. *Matter of Fedorenko, supra; See also, Maikovskis, supra.* Thus, his conduct clearly constitutes assistance in persecution "because of race, religion . . . or political opinion."

(c) "Under the Direction of, or in Association with the Nazi Government of Germany"

The facts established by collateral estoppel reveal that as a concentration camp guard the respondent served in the Nazi Waffen-SS. Thus, these findings clearly demonstrate that his activities at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps were "under the direction of, or in association with" the Nazi Government of Germany. *See* **Exhibit #5**. In addition, although the respondent denied at the hearing serving as a guard at the abovementioned concentration camps, he did admit to serving under the direction of the Nazi Government of Germany during his military service from 1942 to 1945.

> Accordingly, the facts discussed above show clearly, unequivocally, and convincingly that under the direction of, or in association with the Nazi government of Germany, the respondent assisted in the persecution of persons because of their race, religion or political opinion. Therefore, the respondent is deportable pursuant to section 241(a)(4)(D) of the Act.

(3) Respondent's "Special and Affirmative Defenses"

The respondent raised a number of Special and Affirmative Defenses (defenses), some of which the Court has already addressed. However, the Court agrees with the Government that the respondent's defenses ignore the findings of fact and conclusions of law reached by the United States District Court for the Eastern District of Michigan in the respondent's denaturalization proceedings. *United States v. Hammer*, 94-CV-74985-DT (E.D. Mich. June 21, 1996) (*See* **Exhibit #5**). For example, the respondent's conclusory statement regarding his conduct as an armed Waffen-SS Death's Head Battalion guard at Nazi concentration camps and on prisoner transports and his challenges to the evidence that was found to be authentic and reliable by the United States District Court in respondent's denaturalization proceeding (respondent's answer, **Exhibit #2** at paragraphs 3-7, 10-11, 14-17, 36, 38-41, 45-48, 50-52, 54-55, 58-59, 74, 88), are directly contrary to the findings and final judgment of the United States District Court for the Eastern District of Michigan in his denaturalization proceeding (*See* **Exhibit #5**). *See*

United States v. Koziy, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd,* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835 (1984); *United States v. Palciauskas,* 559 F. Supp. 1294, 1296 (M.D. Fla. 1983); *United States v. Linnas,* 685 F.2d 427, 429 (2d Cir. 1982); and *United States v. Kairys,* 782 F.2d 1374 (7th Cir. 1986). The respondent's defenses are comprised of nothing more than conclusory statements that are devoid of either legal authority or factual basis for their applicability to this case. For example, respondent fails to provide any legal authority that would support his bare assertions that his deportation proceeding is barred by, (1) the applicable statute of limitation, (2) by the doctrine of laches and estoppel, (3) by release and waiver or failure to mitigate damages, or (4) equitable relief due to the doctrine of unclean hands.

The Court rejects these unfounded and unsupported defenses for the reasons stated below:

Respondent asserts that the current proceedings "are barred in whole or in part by the applicable statutes of limitations." *See* **Exhibit #2**. He failed to state which, if any, statute of limitations applies in the current proceedings. This may be due to the fact that there appears to be no applicable statute of limitation in immigration proceedings. *See Biggs v. INS,* 55 F.3d 1398 (9th Cir. 1995). This defense asserted by the respondent is without merit and rejected by this Court.

Further, the respondent contends that laches and other equitable doctrines, such as estoppel, preclude the government from going forward with these proceedings. The doctrine of laches, and other equitable defenses are not available against the government in denaturalization cases. *See, e.g., Costella v. United States,* 365 U.S. 265, 282 (1961); *United States v. Fedorenko,* 449 U.S. 490, 517 (1981); *United States v. Schmidt,* 1990 WL 6667 (N.D. Ill. January 3, 1990). It is well settled that the party asserting the defense has the burden to prove that (1) the opposing party lacked diligence and (2) the party claiming the defense is prejudiced. *See U.S. v. Koreh,* 59 F.3d 431 (3d Cir. 1995); *U.S. v. Kairys,* 782 F.2d 1374, 1384 (7th Cir. 1986). Respondent, however, did not express nor establish to the Court how he has allegedly been prejudiced not did he point to any lack of diligence on the part of the Government in going forward with deportation proceedings. Even if the doctrine of laches were applicable, the respondent has failed to state a colorable claim for laches. *See Wauchope v. U.S. Department of State,* 985 F.2d 1407, 1411 (9th Cir. 1993); *E.E.O.C. v. Great Atlantic & Pacific Tea Co.,* 735 F.2d 69, 80 (3d Cir.), *cert. dismissed,* 469 U.S. 925 (1984); *Tudor Development Group v. U.S. Fidelity & Guar. Co.,* 768 F. Supp. 493, 496 (M.D. Pa. 1991) (party asserting laches defenses has burden of establishing elements). These defenses asserted by the respondent are without merit and are rejected by this Court. The Court would also note that the respondent's assertion of the doctrine of unclean hands as a defense is equally without merit as he has failed to establish that the Government's commencement of deportation proceedings was the result of "bad faith" or unclean hands. *See Keystone Driller Co. v. General Excavator Co.,* 290 U.S. 240, 244 (1933); *Shinsaku Nagano v. McGrath,* 187 F.2d 753 (7th Cir. 1951); *Pierce v. Apple Valley,* 597 F. Supp. 1480 (S.D. Ohio 1984). The respondent had tne burden of proving that the Government had unclean hands and he failed to do so. *See Pierce supra,* at 1485.

The respondent, also asserts the defense of Release and Waiver. However, the respondent fails to state or establish what relief or right he claims was "released and waived." The Court will not speculate what, if any, basis the respondent had for asserting this claim. In any case, the court finds no legal basis which would permit the respondent to assert this alleged claim against the government in deportation proceedings. This defense asserted by the respondent is without merit and is rejected by this Court.

Moreover, his conclusive and unsupported defense appears to be an attempt to retry issues already resolved by the United States District Court denaturalization proceeding in which he failed to seek judicial review. This Court has no authority to review the decision of a United States District Court. For example, a number of the respondent's defenses appear to challenge the denaturalization proceeding as being arbitrary, unreasonable and discriminatory and to relate to issues, not before this Court. Indeed paragraphs 53 and 90 of the respondent's answer to the OSC (*See* **Exhibit #2**) are nothing more than an attempt to seek review by this Court of the denaturalization decision in which the respondent failed to appeal. The Court finds that the respondent's defenses on these grounds are without merit as he provides no authority for his position and because this Court has no authority to review the United States District Court denaturalization decision. Furthermore, Paragraphs 18-25, 31-32, 60-62, and 77 of the respondent's defense, set forth in his answer to the

OSC (*See* **Exhibit #2**), relate to the misrepresentations that he made when he immigrated to the United States and was subsequently naturalized. This is not an issue before this Court and therefore these defenses are without merit and are irrelevant to respondent's deportation proceeding. The respondent concedes this is not an issue in his Joint Pre-Hearing Statement (*See* **Exhibit #3**).

Further, the respondent alleged that he may not be found deportable pursuant to section 241(a)(4)(D) of the Act because it is an unconstitutional ex post facto law or bill of attainder (*See* **Exhibit #2** at paragraph 9, 12-13, 26-28, 34-35, 49, 76, 89). This argument, too, lacks merit. *See Artukovic v. INS,* 693 F.2d 894, 897 (9th Cir. 1982). It is well-settled that the creation of a retroactive ground for deportation does not violate the ex post facto prohibition. *Marcello v. Bonds,* 349 U.S. 302, 314 (1955); *Galvan v. Press,* 347 U.S. 572, 531 (1954); *Harisiades v. Shaughnessy,* 342 U.S. 580, 594 (1952). That prohibition applies only to criminal statutes. It does not apply to deportation laws which are civil, not criminal, in nature. *Id.* Moreover, the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder. *See, e.g., Mackay v. McAlexander,* 268 F.2d 35 (9th Cir. 1959), *cert. denied,* 362 U.S. 961 (1960); *Quattrone v. Nicolls,* 210 F.2d 513, 519 (1st Cir.), *cert. denied,* 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. *United States v. Brown,* 381 U.S. 437, 442-44 (1965). This is clearly not the effect of section 241(a)(4)(D) of the Act (the Holtzman Amendment). Deportation is not punishment

(*Harisiades v. Shaughnessy, supra,* at 594), and section 241(a)(4)(D) of the Act does not deprive the respondent of his right to a full evidentiary hearing on the issue of his deportability, with the right to administrative and judicial review. *See also, Schellong v. INS,* 805 F.2d 655, 662 (7th Cir. 1986); *Kulle v. INS,* 825 F.2d 1188 (7th Cir. 1987). In addition, the respondent raised a number of general allegations of constitutional violations which are conclusory and unsupported by a single fact or legal argument. In sum, respondent's constitutional claims are entirely unsubstantiated in fact and law, and amount to an unsuccessful effort to elevate his disagreement with the Government's initiation of deportation proceeding to constitutional claims. *See U.S. v. Schiffer,* 836 F. Supp. 1164, 1172 (E.D. Pa. 1993).

The respondent finally raised as a defense that the deportation proceedings is violative of international law (Paragraphs 56-57, 63-74 of Exhibit #2). The respondent relies on the following international law: (1) the Universal Declaration of Human Rights of 1948 (2) the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; (3) the International Covenant on Civil and Political Rights of 1966; (4) the American Convention on Human Rights of 1969; and (5) the United Nations Covenant on Civil and Political Rights. The respondent asserts these international instruments as a defense without offering any legal authority or providing the Court with a basis for his claim that international law bars the deportation proceeding. The Court finds that the respondent's claim to defenses arising from international law is without merit. The Court notes that the cited declaration, covenants and conventions have not been ratified by the United States Senate, and therefore do not have the force of law. *United States v. Schiffer,* 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff'd* 31 F.3d 1175 (3d Cir. 1994). Absent ratification of these international instruments domestically and the respondent's failure to provide any authority or basis for why these international instruments are applicable, the Court finds also these defenses to be without merit.

(4) Respondent's Eligibility for Relief from Deportation

The respondent seeks relief from deportation under sections 212(c) (Advance Waiver of Inadmissibility and Permission to Return to Unrelinquished Domicile as a Lawful Permanent Resident), 243(h) (Withholding of Deportation) and 244(a)(1) (Suspension of Deportation). Although, the respondent did not submit applications for a § 212(c) waiver and § 243(h) and § 244(a)(1) reliefs, assuming arguendo he had submitted such applications, the Court still would find that he is statutorily ineligible for all such relief. *See* **Exhibit #2** at paragraphs 29, 75, 78-87. The Court finds that the respondent is statutorily ineligible for the requested relief.

An alien found deportable pursuant to § 241(a)(4)(D) of the Act is statutorily barred from relief under § 212(c), § 243(h), and § 244(a)(1) of the Act. *See* § 212(c) of the Act; § 243(h)(2)(A) of the Act; and § 244(a) of the Act. *See also, Maikovskis v. INS,* 773 F.2d 435, 442 (2d Cir. 1985) (§ 243(h)(2)(A) – Withholding of Deportation unavailable; § 244(a) – Suspension of Deportation unavailable.

V. FINDINGS OF FACT

A. Respondent's Service as a Waffen-SS Guard

Respondent, Ferdinand Hammer, joined the Waffen-SS in October 1942, and remained a Waffen-SS guard until 1945. Respondent testified to this fact at his deportation hearing on March 17, 1997. *See* **Exhibit #5**. Respondent held the rank of Totenkopfsturmmann (the rank between private first class and corporal/lance corporal) (*See* **Exhibit #6(e)**). Respondent, as a Waffen-SS Death's Head Battalion guard with the rank of Totenkopfsturmmann, served as an concentration camp armed guard at the Auschwitz and Sachsenhausen Concentration Camps; as well as an armed guard on prisoner transport between Auschwitz and Sachsenhausen concentration camps and between Sachsenhausen and Mauthausen concentration camps. *See* **Exhibit #5**. Respondent's service as a Waffen-SS Death Head's Battalion guard at the abovementioned concentration camps is clearly and convincingly documented by several Waffen-SS Death's Head Battalion guard prepared rosters. The rosters indicate that respondent, Ferdinand Hammer was a member of the 1st Company of the Waffen-SS Death's Head Battalion headquartered in Auschwitz, Sachsenhausen, and Mauthausen concentration camps. (*See* **Exhibits #5, #6(e), and 6(f)**). The rosters specifically list the name, rank and date of birth for guards at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps. Entry #16 of the rosters bears the following information: the name – Ferdinand Hammer; the rank – SS Sturmmann; and the date of birth – 30 July, 1921 (*See* **Exhibits #6(e), #16-19, and #31-33**. The United States District court denaturalization judgment and the unrebutted testimony of historian, Dr. Charles Syndor, Jr., who has written extensively on the history of Nazi concentration camps, determined the rosters to be authentic and reliable, listing only guards at the Auschwitz, Sachsenhausen, and Mauthausen concentration camps.

B. The Nature of the Guard Service At Auschwitz, Sachsenhausen, and Prisoners Transports between Auschwitz and Sachsenhausen and between Sachsenhausen and Mauthausen

The Waffen-SS Death's Head Battalion guards were responsible for and assigned to such concentration camps as Auschwitz, Sachsenhausen, and Mauthausen. These were concentration camps established and operated by the Nazi government of Germany. *See* **Exhibits #5, #6(a), #6(e), #6(f), #25, & #31**. All guards of prisoners in the Auschwitz and Sachsenhausen concentration camps, and on prisoner transport between Auschwitz and Sachsenhausen; and between Sachsenhausen and Mauthausen, during respondent's service as a guard, were members of the Waffen-SS Death's Head Battalion. Guards, including the respondent, at the Auschwitz and Sachsenhausen concentration camps and on prisoner transport, performed various duties including guarding prisoners to ensure that they performed forced labor, and preventing prisoners from escaping. In addition, Waffen-SS guards escorted prisoners on forced labor marches between Auschwitz and Sachsenhausen, and between Sachsenhausen and Mauthausen concentration camps, and guarded prisoners from the camp perimeter and its watch towers. *See* **Exhibits #6 at 2168, #6(b), #6(f), #6(d), #6(g), #6(i), 6(k), #7(a)-(c), #14(c), #16-18, and #22.**

The guards were armed with rifles while performing guard duty, and were under orders to shoot at any prisoner attempting to escape. *See* **Exhibits #5, 6(a), #6(b), #6(f), #6(h), #6(i), #9(a)-(b), and #35.**

While performing such guard duties, Waffen-SS Death's Head Battalion guards ordered, incited, assisted, and generally participated in the persecution of prisoners because of their race, religion, national origin, or political opinion. *See* **Exhibits #6(d), #13(a), #14(c), and 27-28.**

Finally, during the period of the respondent's service in the Waffen-SS, evidence establishes that countless persons, held in the Auschwitz and Sachsenhausen concentration camps, and on prisoner transports between Auschwitz and Sachsenhausen, and between Sachsenhausen and Mauthausen, were murdered as a result of shootings, gassing, electrocution, starvation, forced labor, physical extermination, discrimination, overcrowded and poor hygienic and sanitary conditions, and other forms of killings or persecution. *See* **Exhibits #5, #6(a), #6(f), #13, #14(a)-(c), #27, #28 and #30.**

Consequently, the respondent, as a former member of the Waffen-SS Death's Head Battalion, participated or assisted in persecution of others because of their race, religion, national origin, or political opinion, under the direction of the Nazi government of Germany in violation of section 241(a)(4)(D) of the Act.

VI. CONCLUSION

In view of the foregoing, the Court finds that the respondent is subject to deportation pursuant to the charges contained in the OSC by evidence which is clear, unequivocal, and convincing. *Woodby v. INS* 385 U.S. 276 (1966). Since the respondent is deportable pursuant to § 241(a)(4)(D) of the Act, he is precluded as a matter of law from obtaining the reliefs sought.

ORDER

Upon the basis of the evidence presented in this case, the Court finds that the respondent is deportable on the charges contained in the Order to Show Cause.

The Court also finds that the respondent is statutorily ineligible for waiver or reliefs under § 212(c), § 243(h), and § 244(a)(1) of the Act.

IT IS HEREBY ORDERED that the respondent be deported from the United States to CROATIA on the charges contained in the Order to Show Cause.

IT IS FURTHER ORDERED that the respondent's request for Withholding of Deportation pursuant to § 243(h), Advance Waiver of Inadmissibility and Permission to Return to Unrelinquished Domicile pursuant to § 212(c), and Suspension of Deportation pursuant to § 244(a)(1) are **DENIED,** as respondent is statutorily ineligible for the requested reliefs.

/s/ Michael J. Creppy
MICHAEL J. CREPPY
CHIEF IMMIGRATION JUDGE

DATE: 4/24/97

APPENDIX A

COURT EXHIBITS

Exhibit #1	Order to Show Cause (OSC);
Exhibit #2	Respondent's written answer to the OSC;
Exhibit #3	Joint Pre-Hearing Statement;
Exhibit #4	Supplemental Joint Pre-Hearing Statement;
Exhibit #5	United States District Court decision in the respondent's denaturalization case;
Exhibit #6(a)	Government Exhibit #106, pgs. 2086-2089, Expert testimony of Dr. Charles Syndor, Jr. regarding Government Exhibit #51, (guard regulations and service regulations for the escorts and prison guards, issued by the Dachau concentration Camp in 1933 and setting forth specific regulations for the conduct of guard duty over prisoners);
Exhibit #6(b)	Government Exhibit #106, pgs. 2085, 2098-2099, Expert testimony of Dr. Syndor regarding Government Exhibit #47 (Updated and revised Service Regulations for All Concentration Camps from 1941). Dr. Syndor testified that these regulations were used to train concentration camp guards and provide them with standing order;
Exhibit #6(c)	Government Exhibit #106, pgs. 2105-2107, expert testimony of Dr. Syndor regarding Government Exhibit #59 (a wrong-right picture book used to train guards on the proper way to carry out their duties). Dr.

	Syndor testified that this illustrated picture manual was used to train concentration camp guards who were not proficient in the German language;
Exhibit #6(d)	Government Exhibit #106, pgs. 2072-2076, testimony of Dr. Syndor regarding Government Exhibit #68 (SS Economic and Administrative Main Office, with memo documenting the movements of Jews to Auschwitz); Government Exhibit #69, (memo discussing extermination of Jews through slave labor); Government Exhibit #70 (letter from Nazi minister of Justice discussion placing Jews with SS); and the use of SS Death's Head Unit as concentration camp guards;

U.S. Department of Justice Executive Office for Immigration Review Falls Church, Virginia 22041	Decision of the Board of Immigration Appeals

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File: A08 865 516 – Detroit

In re: FERDINAND *HAMMER* a.k.a. Fred Hammer a.k.a. Ferko Hammer

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:	William E. Bufalino, II, Esquire
ON BEHALF OF SERVICE:	Lisa M. Newell Jeffrey L. Menkin Senior Trial Attorneys Office of Special Investigations Criminal Division Department of Justice

CHARGE:

Order: Sec. 241(a)(4)(D),
I&N Act [8 U.S.C. § 1251(a)(4)(D)] –

Participated in Nazi persecution

APPLICATION: Termination of proceedings

In a decision dated April 24, 1997, the Chief Immigration Judge found the respondent deportable under section 241(a)(4)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(4)(D), and ordered him deported from the United States to Croatia. The respondent has appealed. The appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. § 3.1(e) (1998).

I. PROCEDURAL HISTORY

The respondent is a 77-year-old ethnic German ("Volksdeutscher") and native of Croatia who was admitted to the United States on August 6, 1955, as a Yugoslav stateless person and German expellee under the Refugee Relief Act of 1953. On September 23, 1963, the respondent became a naturalized citizen of the United States.

A. Denaturalization

Subsequently, the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of Michigan, alleging that he had procured his citizenship by concealing or willfully misrepresenting his wartime service as an armed guard in the Waffen SS Totenkopfsturmbann ("Death's Head Battalion")[1] at the Auschwitz concentration camp in Nazi-occupied Poland and at the Sachsenhausen concentration camp in Germany, as well as on transports of prisoners between concentration camps. At a 4-day trial that commenced on May 16, 1996, the Government presented the following documents to prove its allegations regarding the respondent's wartime service: a certified copy of a Supreme Headquarters Allied Expeditionary Force (SHAEF) card, describing the respondent as an SS Sturmmann[2] assigned to the 1st Company of the SS Totenkopfsturmbann Auschwitz as of December 7, 1944; a certified copy of a transfer list of prisoner escorts from Auschwitz to Sachsenhausen,[3] dated February 15, 1945, which includes the respondent's name and rank; and multiple certified copies of a transfer list of prisoner escorts from Sachsenhausen to the Mauthausen concentration camp in Austria, dated February 13, 1945, showing the respondent's name, rank, and date of birth.

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[1] "SS" is the acronym for "Schutzstaffel," or protection squad. It developed into the elite guard of the Nazi dictatorship. After the outbreak of war in 1939, the "Waffen SS," or armed SS, was formally created as the militarized branch of the SS. The Waffen SS included the Death's Head Battalions, previously known as the Death's Head Units, which guarded the various concentration camps.

The Government also presented, inter alia, the testimony of an expert witness, Dr. Charles W. Sydnor, a historian of Nazi Germany, including the Waffen SS and the concentration camp system. Dr. Sydnor identified the SHAEF card as a document created by a United States Army specialist based on an examination of captured SS records following the surrender of Nazi Germany in May 1945.[4] Dr. Sydnor identified the February 15, 1945, transfer list as a document taken from the archives of the state museum in Auschwitz that originated from the liaison office of the Auschwitz concentration camp 2 to 3 weeks after Auschwitz was evacuated. He explained that after the evacuation of Auschwitz in January 1945, the liaison office compiled, for record-keeping purposes, lists of the SS personnel that had been transferred elsewhere in the west as the Russian Army approached the camp from the east. The February 13, 1945, transfer list, on the other hand, copies of which were taken from various sources, including the archives of the Russian Federation, is a personnel document from the office of the SS Death's Head Battalion at Sachsenhausen. It indicates that many of the named individuals, including the respondent, had come from Auschwitz as SS guards and, on the date of the list, February 13, 1945, were being assigned to escort a transport of prisoners from Sachsenhausen to the concentration camp at Mauthausen. The document further indicates that from Mauthausen, the guards were to be transferred to the Flossenburg concentration camp.

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[2] The rank of Sturmmann is roughly the equivalent of lance corporal.

[3] The list actually refers to Oranienburg, the location of the Sachsenhausen concentration camp.

[4] According to Dr. Sydnor, such records were used to conduct background investigations of applicants for immigrant visas during the period in which the Displaced Persons Act of 1948 ("DPA") was in effect. As noted above, the respondent immigrated to the United States under the Refugee Relief Act of 1953.

In addition, the respondent was called as a witness by the Government and in his own defense. He admitted that he was a Sturmmann in the Waffen SS and, thus, was armed, but he denied that he ever served at a concentration camp or on prisoner transports between concentration camps. Rather, he claimed that, despite the hearing problems he had developed as a child and his lack of proficiency in the German language, he was conscripted by the Germans in October 1942 and was ultimately assigned to a combat division on the Russian front. Nevertheless, when shown the transfer list of prisoner escorts from Auschwitz to Sachsenhausen, he conceded that it includes his name and rank. Moreover, he could offer no explanation for why his name, rank, and date of birth appear on the transfer list of prisoner escorts from Sachsenhausen to Mauthausen.

On June 21, 1996, the district court entered an order revoking the respondent's citizenship and cancelling his certificate of naturalization. *United States v. Hammer*, No. 94 Civ. 74985 (E.D. Mich. June 21, 1996). In its decision, the district court's findings of fact included the following: "[a]ll three documents relied on by the [G]overnment to prove [the respondent's] service during World War II as an armed SS Death's Head Battalion guard at concentration camps established and operated by forces of the Nazi Government of Germany and on prisoner transports are authentic and reliable"; Dr. Sydnor's testimony, unlike the respondent's testimony, was credible; and "[h]orrible mistreatment" was inflicted upon the prisoners of the concentration camps. *Id.* Based on its findings and the evidence presented by the Government, the district court found that the Government carried its burden of proving that the respondent "was a guard at the Auschwitz and Sachsenhausen concentration camps for some period of time." *Id.* The district court concluded as a matter of law that, in view of the "horrible activities occurring in these concentration camps and during the transports and evacuations," the respondent's misrepresentations in his application for naturalization regarding "his service as a guard at Auschwitz or on prisoner transports were material and would very likely have affected the decision to grant citizenship." *Id.* The district court's decision became final upon expiration of the appeal period.

B. Proceedings Before the Chief Immigration Judge

On October 31, 1996, the respondent was served with an Order to Show Cause charging him with deportability under section 241(a)(4)(D) of the Act as an alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion. The respondent was charged under section 241(a)(4)(D) of the Act, which is also known as the "Holtzman Amendment," on three bases: (1) his alleged service as an armed guard at the Auschwitz concentration camp; (2) his alleged service as a prisoner escort on the transport from Auschwitz to the Sachsenhausen concentration camp; and (3) his alleged service as an armed guard at Sachsenhausen. According to the Chief Immigration Judge's decision, a master calendar hearing was held on February 3, 1997, at which the respondent denied the factual allegations and the charge of deportability contained in the Order to Show Cause. The respondent also declined to designate a country of deportation, which led to the designation of Croatia.

In joint pre-hearing statements filed with the Immigration Court on February 26, 1997, and March 10, 1997, respectively, the parties stipulated to facts relating to the respondent's identity and immigration history, including the revocation of his citizenship. In addition, the parties stipulated that, no later than December 7, 1944, the respondent became a guard in the 1st Company of the SS Death's Head Battalion at the Auschwitz concentration camp, but the respondent later changed his plea and denied this allegation. The parties were unable to agree to allegations relating to the respondent's activities as a member of the SS Death's Head Battalion, including his alleged service as an armed guard of prisoners at Auschwitz and Sachsenhausen and as a prisoner escort on transports between the camps. The respondent also contested that prisoners were subjected to persecutory treatment at Auschwitz and Sachsenhausen and on the transports.

To sustain its charge of deportability, the Government indicated that it would rely on the stipulations, the transcript of the denaturalization proceeding, and the documents admitted into evidence at the denaturalization proceeding. The respondent, in turn, challenged the constitutionality of the Holtzman Amendment and incorporated the "Special and Affirmative Defenses" set forth in his initial written pleading to the Order to Show Cause. The "Special and Affirmative Defenses" included objections to the testimonial and documentary evidence from the denaturalization proceeding.

Following a merits hearing on March 17, 1997, the Chief Immigration Judge rendered his decision finding the respondent deportable as charged and ordering him deported from the United States to Croatia. The Chief Immigration Judge based his finding of deportability on the facts determined by the denaturalization judgment through the application of the doctrine of collateral estoppel, as well as on an independent review of the evidence presented by the Government. In reaching his conclusion, the Chief Immigration Judge found that the evidence presented by the respondent was of insufficient probative value to rebut the case against him, in part because his testimony at the hearing was not credible. The Chief Immigration Judge also rejected the respondent's "Special and Affirmative Defenses."

II. PRIMARY ISSUE ON APPEAL

The respondent's arguments on appeal are confusing and difficult to follow. For instance, he advances arguments that do not pertain to the deportation proceedings now before us. He also appears to quote or paraphrase, with or without attribution, from circuit court and Board decisions that do not necessarily support his case.[5] At the same time, although he never actually cites to *Petkiewvtsch v. INS*, 945 F.2d 871 (6th Cir. 1991), it is apparent that he relies on this decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction his case arises. As discussed more fully below, the court in *Petkiewvtsch v. INS, supra,* held that an alien was not deportable under the Holtzman Amendment where he served involuntarily as a camp civilian guard and never personally abused prisoners.

Therefore, for the sake of clarity, we note that we consider the primary issue before us to be whether the denaturalization judgment and/or the evidence presented from the denaturalization proceeding is sufficient to meet the Government's burden of establishing that the respondent assisted in persecution for purposes of the Holtzman Amendment. In addressing this issue, however, we must first examine the doctrine of collateral. estoppel and its applicability in deportation proceedings.

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[5] For its part, the Government inappropriately refers to an unpublished Board decision, *Matter of Tittjung*, A08 615 083 (BIA Aug. 13. 1997), as if it were published as Interim Decision 3327.

III. DOCTRINE OF COLLATERAL ESTOPPEL

The Sixth Circuit has enunciated four criteria that must be satisfied for the doctrine of collateral estoppel to apply:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> (3) the prior proceeding must have resulted in a final judgment on the merits; and
>
> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Detroit Police Officers Ass'n v. Young, 824 F.2d 512, 515 (6th Cir. 1987). Provided these four criteria are met, the doctrine may be invoked to preclude relitigation of both issues of law and issues of fact. *United States v. Stauffer Chem. Co.*, 464 U.S. 575, 170-71 (1984); *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *see Montana v. United States*, 440 U.S. 147, 153-54 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Matter of Fedorenko*, 19 I&N Dec. 57, 67 (BIA 1984). We note, however, that the use of collateral estoppel is unfair and, thus, inappropriate where "controlling facts or legal principles have changed significantly, or where the circumstances of the case justify an exception to general estoppel principles." *Detroit Police Officers Ass'n v. Young, supra; see Matter of Fedorenko, supra.*

In an apparent effort to argue against the use of collateral estoppel in deportation proceedings, the respondent borrows from a passage in *Schellong v. INS*, 805 F.2d 655, 658 (7th Cir. 1986), in which the United States Court of Appeals for the Seventh Circuit discussed the case of *Title v. INS*, 322 F.2d 21 (9th Cir. 1963). In *Title v. INS, supra*, at 24, the United States Court of Appeals for the Ninth Circuit held that the application of collateral estoppel had effectively deprived the alien of his right to a deportation hearing under section 242(b) of the Act, 8 U.S.C. § 1252(b). The court also found that the use of collateral estoppel in the alien's case had been unfair. *Id.*

However, as the respondent also appears to acknowledge, the Seventh Circuit ultimately found that the holding in *Title* was limited to the circumstances present in that case, where the alien "had presented no evidence at his denaturalization trial and despite a change in the applicable law was not allowed to present evidence at his deportation hearing." *Schellong v. INS, supra.* The court later observed:

> Given the full and fair judicial hearing to which an alien is entitled in a denaturalization proceeding, there is no reason not to apply the doctrine of collateral estoppel in a subsequent deportation proceeding to bar the relitigation of facts actually litigated and necessarily determined in the denaturalization case.

Kairys v. INS, 981 F.2d 937, 939 (7th Cir. 1992). This Board came to the same conclusion in *Matter of Fedorenko, supra,* at 61-64. As there has been no change in the applicable law in this case, and we find no other circumstances to justify an exception to general estoppel principles, we consider it appropriate to give conclusive effect to the pertinent issues that were actually litigated and necessary to the final denaturalization judgment against the respondent.

IV. DEPORTABILITY

A. The Respondent's Wartime Service as an Armed Concentration Camp Guard

The respondent argues that the Chief Immigration Judge overstated the facts that were conclusively determined by the denaturalization judgment. He does not dispute that the issue of whether he was a "guard at the Auschwitz and Sachsenhausen concentration camps for some period of time" was actually litigated and necessary to the decision to revoke his citizenship. *United States v. Hammer, supra*. His service as a guard at Auschwitz and Sachsenhausen, where "horrible activities" occurred, was the material fact concealed or misrepresented in his naturalization application. *Id.* We note that, as the respondent is therefore precluded from relitigating this issue, we have disregarded his testimony at the hearing denying that he was ever a concentration camp guard. Even assuming that the respondent spent some time on the Russian front as he claims, he is estopped from contesting the fact that he also spent at least part of the war as a concentration camp guard at Auschwitz and Sachsenhausen.[6]

However, the respondent points out that the district court did not specifically find that he was an "armed" guard, though he acknowledges that the issue was actually litigated. While we do not believe that the omission was deliberate, we agree that the precise issue of whether he was an armed guard may not have been conclusively determined in the denaturalization proceeding. We find that the respondent gains very little by the district court's omission, though, because the record is replete with evidence establishing that concentration camp guards at Auschwitz and Sachsenhausen were in fact armed. The record also includes ample evidence to show that, as an SS Sturmmann, the respondent himself was armed.[7]

We recognize that the respondent continues to object to the Government's evidence against him. For instance, he describes the documentary evidence as having been "salvaged" from the archives of the former Soviet Union, notwithstanding the fact that among the identification documents, this description pertains to only one of the copies of one of the transfer lists. Using language obviously taken from *Kaleis v. INS*, 10 F.3d 441, 447 (7th Cir. 1993), he contends that "we should scrap" such evidence because it is "inherently untrustworthy."

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[6] We also note, nevertheless, that the background information provided by Dr. Sydnor regarding the Waffen SS and the particular combat division with which the respondent claims he served fully supports the Chief Immigration Judge's adverse credibility finding against the respondent.

[7] The respondent's own testimony confirms this fact.

The test for admissibility of evidence in deportation proceedings is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law. *See, e.g., Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988). In this case, the evidence from the denaturalization proceeding was deemed admissible in a forum in which the Federal Rules of Evidence apply. We further note that an examination of the record of a prior proceeding generally is required to determine how broadly to apply the doctrine of collateral estoppel. *See United States v. Johnson*, 697 F.2d 735, 739 (6th Cir. 1983). Moreover, the regulations at 8 C.F.R. § 240.46(b) (1998) provide that the Immigration Judge "may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." *See Matter of D-*, 20 I&N Dec. 827, 831 (BIA 1994). Thus, the Chief Immigration Judge properly admitted both the testimonial and documentary evidence from the denaturalization proceeding.

Like the district court and the Chief Immigration Judge, we accord great weight to the denaturalization evidence, particularly the SHAEF card and transfer lists, which the district court specifically found to be authentic and reliable, and Dr. Sydnor's testimony, which the district court specifically found to be credible. Indeed, as the district court's findings regarding the respondent's wartime service, including the finding of horrible mistreatment at the camps, were based on this evidence, the respondent may even be collaterally estopped from raising his objections in these proceedings.[8] Based on our own review, we find that the record of the denaturalization proceeding provides clear, unequivocal, and convincing evidence that the respondent was not just a guard at Auschwitz and Sachsenhausen, but rather an armed SS Death's Head Battalion guard who also escorted prisoners from Auschwitz to Sachsenhausen and from Sachsenhausen to Mauthausen. *See generally United States v. Stelmokas,* 100 F.3d 302 (3d Cir. 1996) (finding ancient documents sufficient to establish that the defendant was a member of an armed group that assisted the Nazis in the persecution of Jews and other unarmed civilians in Lithuania); *United States v. Kairys,* 782 F.2d 1374 (7th Cir. 1986) (finding that a properly authenticated SS identity card established that the defendant was an armed camp guard at Treblinka); *United States v. Tittjung,* 753 F. Supp. 251 (E.D. Wisc. 1990), *aff'd,* 948 F.2d 1292 (7th Cir. 1991) (finding that the defendant's service as an armed concentration camp guard was clearly and convincingly documented by an SS-prepared roster).

B. Service as an Armed Concentration Camp Guard is Persecution Within the Meaning of the Act

In *Fedorenko v. United States,* 449 U.S. 490 (1981), the Supreme Court held that service as an armed concentration camp guard, whether voluntary or involuntary, was assistance in persecution for purposes of the Displaced Persons Act of 1948 ("DPA").[9] The Court explained that the omission of the word "voluntary" from the definition of "displaced person" under the DPA "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512. However, to address the concern of the district court below that this interpretation of the term "assisted" could exclude survivors who had been forced to assist the SS in the operation of the camps, the Court stated that the focus should be on:

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[8] At his denaturalization trial, the respondent did not object to the documentary evidence on authentication grounds, but the transcript of proceeding reflects that the issue of the authenticity and reliability of the SHAEF card and transfer lists was fully litigated.

> whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was

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[9] The DPA provided immigrant visas for European refugees after World War II. Section 2(b) of the DPA provided: " 'Displaced person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the International Refugee Organization ("IRO") Constitution, in turn, excluded from the definition of "refugee or displaced person" any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Section 13 of the DPA, as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950), specified that "[n]o visas shall be issued . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."

> paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems . . . .

Id. at n.34. Based on this language, the Sixth Circuit indicated in *Petkiewytsch v. INS, supra,* that a showing of some personal involvement in acts of persecution was necessary to sustain a finding of assistance in persecution.[10]

1. *Petkiewytsch*

In *Petkiewytsch,* the court reviewed the legislative history of section 241(a)(4)(D) of the Act and found that it differed from the DPA in that its purpose was to reach Nazi war criminals. *Id.* at 879-80. To the court, language included in the legislative history "appear[ed] to require active participation in persecution going beyond 'assistance.' " *Id.* at 880. Focusing on Petkiewytsch's "particular conduct," as instructed by the Supreme Court, the court observed that he did "not fit the description of a 'Nazi war criminal' . . . . " *Id.* at 881. The court concluded that, "[g]iven all the circumstances" of the case, *Fedorenko* did not require a finding that Petkiewytsch was deportable under the Holtzman Amendment. *Id.*

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[10] We note that this conclusion was also reached by the United States Courts of Appeal for the Second and Ninth Circuits in *United States v. Sprogis,* 763 F.2d 115 (2d Cir. 1985), and *Lainenieks v. INS,* 750 F.2d 1427 (9th Cir. 1985), respectively. However, as both *Sprogis* and *Laipenieks* involved policemen, not camp guards, we consider them inapposite to this case. *See generally United States v. Sprogis, supra,* at 121 (noting that Sprogis' case "obviously falls between the extremes of the death camp barber and the weapon wielding guard and presents the difficult problem of where to draw the line").

However, as the court emphasized, Petkiewytsch was a civilian guard at a labor education camp who, following the war, was apprehended by the British as a suspected war criminal, but then released "under 'category 5,' which meant that he was totally exonerated of any wrongdoing and of all charges against him." *Id.* at 873. Labor education camps were the "least punitive of all types of Nazi camps." *Id.* at 881. No fence surrounded the Kiel-Hasse camp in Germany, where Petkiewytsch served. *Id.* at 874. While physical abuses, malnutrition, and overcrowded conditions were prevalent, prisoners typically were incarcerated for a period of just 56 days. *Id.* Moreover, the beatings and other such acts of persecution experienced by the prisoners were "primarily at the hand of SS guards present at the camp and more senior Gestapo officials rather than at the hand of civilian guards" like Petkiewytsch. *Id.* The court also considered the undisputed evidence that Petkiewytsch's refusal to serve would have subjected him to imprisonment or execution and that, on one occasion, Petkiewytsch was in fact imprisoned for failing to perform his guard duties diligently. *Id.* at 872-73, 881. Therefore, Petkiewytsch's case presented the difficult line-drawing problems referred to by the Supreme Court. *Id.* at 878.

2. The Nature of Concentration Camps, Particularly Auschwitz

In contrast, the respondent before us served at the Auschwitz and Sachsenhausen concentration camps and on prisoner transports between these and other concentration camps. As the court in *Petkiewytsch* observed, concentration camps were the "most repressive [of the] Nazi camps." *Id.* at 873. Some of these camps, including Auschwitz, were extermination camps, "intended and used solely to eliminate Jews and other groups of people deemed inferior by the Nazis." *Id.*

The record reflects that the concentration camp system was operated by the SS as a means of enforcing the Nazi dictatorship of Adolf Hitler. As noted above, the respondent's misrepresentations regarding his wartime service were considered material by the district court because of the horrible mistreatment of prisoners at the concentration camps to which he was assigned. *United States v. Hammer, supra.* According to Dr. Sydnor and the documentary evidence of record, the horrible mistreatment at concentration camps generally included the execution or indefinite detention, referred to as "protective detention," of political and religious opponents of the Nazi regime or anyone else suspected of undermining the German war effort. Unless executed upon arrival, prisoners deemed racially or politically dangerous to the Germans were subjected to "extermination through work" at the camps. "Extermination through work" meant that prisoners were worked to death through slave labor. At Auschwitz, due to inadequate nutrition, prisoners were usually completely emaciated within a short period of their arrival. Prisoners were also subjected to inhuman living conditions, corporal punishment, torture, and medical experimentation.

Those arrested and sent to concentration camps included Protestant and Catholic clergymen, Jehovah's Witnesses, Russians, Ukrainians, Czechs. Poles, Gypsies, Communists, and, of course, Jews. An order issued on March 9, 1940, by Heinrich Himmler, the Reichsfiihrer, or leader, of the SS and Chief of the German Police, specifically banned the release of "all Jewish protective detainees in the concentration camps for the duration of the war." Subsequently, Auschwitz, as an extermination camp, played an important role in the implementation of the so-called "Final Solution of the Jewish Question," which was the decision by Nazi leaders to exterminate the Jews in Europe. By the summer of 1944, most of the new arrivals at Auschwitz were selected for extermination in the gas chambers shortly after detraining. For instance, between May 1944 and October 1944 alone, approximately half a million Hungarian Jews were murdered upon their arrival. Arriving prisoners who survived the initial selections became slave laborers.

At the respondent's denaturalization trial, two concentration camp survivors gave testimony describing their own painful experiences at Auschwitz. Though both stories are poignant, we need only focus on the testimony of one of the survivors to illustrate the truly horrible nature of that camp. Professor Thomas Buergenthal was born in Czechoslovakia on May 11, 1934. He was sent to Auschwitz in the summer of 1944, at the age of 10. The camp was enclosed by electric barbed wire, and there were also armed guards, dogs, and guard towers. Upon his arrival, he was separated from his mother, whom he saw on only one occasion thereafter. He and his father were taken to a building called a "sauna," where they had their hair shaved off and were otherwise "disinfected." They were later tattooed with identification numbers. Professor Buergenthal's number started with a "B" as in boy. On his prison uniform, Professor Buergenthal wore a yellow triangle, which signified that he was a Jew. Most of the triangles he saw at Auschwitz were yellow. While living and working as an errand boy within the camp, Professor Buergenthal witnessed other prisoners being beaten and effectively chased into the electric wires. He also saw the crematoria, which emitted a large amount of smoke and a very unpleasant odor. At one point, he heard screams coming from the gas chambers.

When asked to recount a typical day at Auschwitz, Professor Buergenthal said that the thing he remembers the most was that he and the other prisoners were always hungry. They were made to subsist on substitute coffee and a piece of bread at daybreak and soup. and rotten bread at the end of the day. Most of the prisoners were very thin and underweight, some extremely so.

In October or November of 1944, Professor Buergenthal was separated from his father during a selection. His father was ultimately transferred to Flossenburg, where he reportedly was shot 3 days before the end of the war. Professor Buergenthal was placed in a holding barracks to await being sent to the gas chambers. In trying to escape from the barracks to avoid the gas chambers, he was beaten. One morning, though, he awoke to find the other prisoners in the barracks gone. He believes that a Polish doctor saved his life.

Professor Buergenthal was evacuated out of Auschwitz in January 1945. During the transport, he and other prisoners were forced to march for about 3 days before they were put on trains en route to Sachsenhausen. At Sachsenhausen, two of his toes were amputated due to frostbite. As the Russians continued their advance, he was left in the infirmary and eventually liberated at the end of April 1945, an orphan less than a month shy of his 11th birthday. Neither Professor Buergenthal nor Bernice Shapiro, the other survivor, was aware of any reason for their confinement by the Nazis other than that they were Jewish.

3. Service as an SS guard

In his appellate brief, the respondent queries, as did the dissent in *United States v. Kowalchuk*, 773 F.2d 488, 513 (3d Cir. 1985), whether a baker who delivered bread to a Nazi-organized militia or janitor who cleaned offices at militia headquarters can be said to have assisted in persecution. This issue does not concern us here, because the respondent was not a baker or a janitor. *See generally United States v. Kairys, supra*, at 1378 ("Although the Supreme Court notes that Fedorenko had testified to shooting in the direction of escaping prisoners, this was to distinguish Fedorenko's position as a camp guard from those concentration camp survivors who were forced to perform tasks within the camp."). The respondent was not a civilian at all, nor even a prisoner-of-war turned guard, as was Fedorenko. He joined the Waffen SS in

October 1942[11] and, by December 1944 at the latest, was assigned to the Death's Head Battalion at Auschwitz.[12]

The record reflects that SS Death's Head Battalion guards served the purpose of preventing prisoners from escaping and ensuring that prisoners did their work. They wore a skull and crossbones on the collar of their uniforms and were armed with weapons such as rifles with bayonets and, in some cases, German Shepherds trained to watch, attack, and kill. Their duties included guarding the wire perimeters of the camps, the protective custody compounds wherein the prisoners' barracks -were located, and the work details of prisoners inside the camps or at adjacent industrial or agricultural labor sites. SS guards also escorted prisoners who were transferred from one concentration camp to another.

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[11] Incidentally, Dr. Sydnor's testimony and the documents he identified and explained indicate that by October 1942, the Croatian government and the German Foreign Ministry had reached an agreement allowing for only the recruitment of eligible *volunteers* from the ethnic German population in Croatia. Thus, while the SS was very aggressive in its recruitment of ethnic Germans, and put a lot of pressure on individuals and their families, the SS had no legal authority to conscript an ethnic German in Croatia at the time that the respondent joined the Waffen SS. We note that at the deportation hearing, the respondent submitted a document to indicate otherwise, but the Chief Immigration Judge found that the document was not properly authenticated, and the respondent has not challenged this finding on appeal. We also note that the document refers to agreements in 1942 and 1943 for the induction, but not necessarily the conscription, of ethnic Germans in Croatia.

[12] According to Dr. Sydnor, SS recruits assigned to concentration camps were generally those who were deemed unfit for combat service, but refusing a concentration camp assignment did not result in execution. Rather, such recruits were deployed to perform tasks such as guarding bridges, doing rural police work, or in extreme cases, clearing minefields or defusing bombs. An SS guard who refused to carry out his duties once he was already assigned to a concentration camp would have been punished and probably transferred, but Dr. Sydnor was unaware of any documented instance in the historical records of an SS guard being court-martiailed and shot for refusing guard duty at a concentration camp.

At the concentration camps, SS guards were under orders to shoot at any prisoner who attempted to escape. *See generally United States v. Breyer*, 41 F.3d 884, 890 (3d Cir. 1994) (finding assistance in persecution where the defendant "was a trained, paid, uniformed armed Nazi guard who patrolled the perimeters of two [concentration] camps with orders to shoot those who tried to escape"). Moreover, any SS guard at Auschwitz would have known that it was an extermination camp. Indeed, when trains of Jewish prisoners arrived at the Birkenau death camp within the Auschwitz complex, SS guards were assigned to "ramp duty" on an as need basis to secure the area to allow the selections to take place.

Dr. Sydnor testified that on prisoner transports such as the transport from Auschwitz to Sachsenhausen during the evacuation of Auschwitz, SS guards were under orders to shoot not only those who attempted to escape, but also those who could not keep up the pace set for marching. We note in this regard that, although the evacuation of Auschwitz took place in January during a winter that was very cold, the prisoners were not given adequate clothing or proper footwear for marching. We also recall Professor Buergenthal's frostbite and the evidence of severe malnourishment among the prisoners.

The record includes no evidence to indicate that the respondent was ever disciplined by his Nazi commanders for any dereliction of his duties as a guard at the camps or on the transports. Likewise, despite the creation of the SHAEF card, we find no evidence that the respondent was ever taken into custody by Allied authorities as a suspected war criminal and then released upon being exonerated of any wrongdoing. Rather, we note that the rank of Sturmmann was not an entry-level rank, and thus, the respondent was likely in a supervisory position over a small number of other SS guards. Dr. Sydnor also testified that the fact that the respondent was assigned to the 1st Company of the Death's Head Battalion at Auschwitz indicates that he served at the main camp at Auschwitz, where guards with experience were transferred.

4. Conclusion

In short, unlike *Petkiewytsch,* this case presents no line-drawing problems. "Service as an armed guard . . . ensured the systematic destruction of concentration camp inmates." *United States v. Schmidt,* 923 F.2d 1253, 1259 (7th Cir. 1991).

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. INS, supra, at 943; *see also United States v. Koreh,* 59 F.3d 431, 442 (3d Cir. 1995) (finding that assistance in persecution does not require "personal participation . . . in the commission of physical atrocities."); *Kulle v. INS,* 825 F.2d 1188, 1193 (7th Cir. 1987) (explaining that in deportation cases, the "proof is directed toward showing presence at a place of persecution, and 'assistance' in persecution is inferred from the circumstances); *Matter of Kulle,* 19 I&N Dec. 318 (BIA 1985) (holding that the term "persecution" includes the confinement of political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, Jews, and other opponents of the Nazi regime at the Gross-Rosen concentration camp); *Matter of Fedorenko, supra,* at 69 (finding that "the objective effect of the respondent's conduct as a perimeter guard would have been to aid the Nazis, in some small measure, in their confinement and execution of Jewish prisoners at Treblinka").

In his closing argument before the Chief Immigration Judge, even the respondent conceded that the Nazis committed atrocities during World War II. On appeal, he makes reference to the Holocaust, "the worst genocide of the modern era, if not of all time." In view of the evidence of what amounts to the systematic persecution of persons because of race, religion, national origin, and political opinion under the concentration camp system, particularly at the Auschwitz concentration camp, a primary instrument of the Holocaust, we find that by simply "impeding [prisoners'] escape through his presence" as an armed SS Death's Head Battalion guard, *cf. Petkiewytsch v. INS, supra,* at 873, the respondent was actively and personally involved in persecution to a sufficient extent to fall within the scope of the Holtzman Amendment.

We emphasize that, under the plain language of the statute itself, an alien is deportable if he merely "assisted" in the persecution of others. See *Matter of Kulle, supra,* at 332; *Matter of Fedorenko, supra; see also Kalejs v. INS, supra,* at 444 ("The Holtzman Amendment's noncriminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war."). As the objective effect of an alien's actions, not his motivation and intent, controls in determining whether he "assisted" in persecution, the voluntariness of his actions is irrelevant. *Matter of Fedorenko, supra,* at 69-70; *see Fedorenko v. United States, supra,* at 512; *United States v. Breyer, supra; United States v. Schmidt, supra,* at 1257-58; *Maikovskis v. INS,* 773 F.2d 435, 445-46 (2d Cir. 1985); *see also Matter of Kulle, supra* ("Congress intended that all who assisted the Nazis in persecuting others must be deported regardless of the degree of voluntariness of such assistance.").

Thus, based on the respondent's wartime service as an armed concentration camp guard, particularly his service at Auschwitz, we find him deportable under section 241(a)(4)(D) of the Act. We note, as did the Chief Immigration Judge, that the respondent's deportability under section 241(a)(4)(D) of the Act renders him ineligible for any relief from deportation. Moreover, we find no evidence that any country other than Croatia was ever designated for deportation by either party or the Chief

Immigration Judge. Therefore, we find that the respondent was correctly ordered deported from the United States to Croatia, the country of his birth. *See* section 243(a)(3) of the Act, 8 U.S.C. § 1253(a)(3).

V. FAIR HEARING

On appeal, the respondent also raises a fair hearing claim. He asserts that the Chief Immigration Judge "showed improper bias and should be reversed because he disregarded the district court's findings when he mischaracterized the respondent's testimony, and he applied his own moral standards to assess the respondent's actions during World War II." We find no evidence whatsoever to support this assertion, which is virtually identical to a passage appearing in *Matter of Fedorenko, supra,* at 72. Indeed, the Chief Immigration Judge and the district court were in agreement as to the credibility of the respondent's testimony, and unlike the Immigration Judge who presided over Fedorenko's case, the Chief Immigration Judge in this case did not make any ill-advised comments about the respondent's character and motivations.

Additiorially, we note that the Chief Immigration Judge was generally quite lenient with the respondent. After having stipulated that he was a guard in the 1st Company of the SS Death's Head Battalion at Auschwitz, the respondent was permitted at the hearing to change his plea and deny this allegation. At the conclusion of the hearing, over the Government's objection, the respondent was permitted to submit an unauthenticated document despite his noncompliance with the Chief Immigration Judge's pre-hearing orders.

The only adverse procedural ruling the respondent identifies, other than the ruling on the admissibility of the Government's evidence, is the Chief Immigration Judge's decision to delay his ruling on the respondent's "Special and Affirmative Defenses." However, our review of the transcript of the hearing reveals that the respondent raised no objection to the Chief Immigration Judge's conduct of the hearing. *See generally Matter of Edwards*, 20 I&N Dec. 191, 196 n.4 (BIA 1990) (noting that it is inappropriate to raise an objection for the first time on appeal). In any event, we find that the respondent has failed to show how he was prejudiced by the delay or any other perceived deficiency in the proceedings. *See, e.g., Matter of D-, supra; see also Matter of Fedorenko, supra*, at 73 (rejecting the respondent's fair hearing claim where he failed to show prejudice).

We lack the authority to review the Government's decision to institute deportation proceedings against the respondent. *E.g., Matter of U-M-*, 20 I&N Dec. 327, 333 (BIA 1991); *see also United States v. Peoples Household Furnishings Inc*, 75 F.3d 252, 256 (6th Cir. 1996) (observing that the "nullum tempus rule," or rule that the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitations is a federal common law rule); *Matter of Garcia-Linares*, Interim Decision 3268, at 11 (BIA 1996) (noting that "there is no 'statute of limitations' in deportation proceedings"); *Matter of Sparrow*, 20 I&N Dec. 920, 923 (BIA 1994) ("Laches or neglect of duty on the part of officers of the Government generally may not be invoked against the Government when it acts to enforce a public right or protect a public interest."). Likewise, it is not within our province to rule on the validity of the statutes and regulations we administer. *E.g., Matter of Hemandez-Puente,* 20 I&N Dec. 335, 339 (BIA 1991). We further note, as did the Chief Immigration Judge, that the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder and other such challenges to the Holtzman Amendment. *See, e.g., Schellong v. INS, supra,* at 662-63. Lastly, having addressed the issue of the admissibility of the Government's evidence, we emphasize that we must affirm the Chief Immigration Judge's order of deportation against the respondent, because the evidence, together with the denaturalization judgment, sustains the charge. *See, e.g., Matter of Roussis,* 18 I&N Dec. 256, 258 (BIA 1982).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ Illegible
FOR THE BOARD